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USE "THE FILTER YOU WERE BORN WITH":*THE UNCONSTITUTIONALITY OF MANDATORY INTERNET FILTERING FOR THE ADULT PATRONS OF PUBLIC LIBRARIES

Richard J. Peltz[†]

Abstract: The only federal court (at the time of this writing) to consider the question ruled unconstitutional the mandatory filtering of Internet access for the adult patrons of public libraries. That 1998 decision helped the American Library Association and other free speech advocates fend off mandatory filtering for two years at the state and federal level, against the vigorous efforts of filtering proponents. Then, in 2000, the U.S. Congress conditioned federal funding of libraries on filter use, forcing the question into the courts as the latest colossal struggle over Internet regulation. This Article contends that the federal court in 1998 was right, and the Article counters criticism that has been leveled against that decision since. The public library is the quintessential venue for citizens to exercise their First Amendment right to receive information and ideas. As such, the library should be preserved against the imposition of automated content filters, which are too imprecise, and alternatively value-laden or arbitrary, to meet exacting constitutional safeguards.

I. INTRODUCTION

The Washington Coalition Against Censorship sells a T-shirt that leaves little doubt where the organization stands on Internet filtering. "Use your brain," the shirt says, "[t]he filter you were born with."¹ Coalition Executive Director Barbara Dority authored a 1999 article captioned even more bluntly: "Filtering: Just Another Form of Censorship."² While intellectual freedom champions such as the American Civil Liberties Union (ACLU) and the American Library Association (ALA) agree, lawmakers across the country do not. Spurring the latest and hottest battle over expressive freedom on the Internet, mandatory filtering has become all the rage in lawmaking.³ Leading the

* See *infra* notes 1–2 and accompanying text.

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1. Barbara Dority, *Filtering: Just Another Form of Censorship*, HUMANIST, Mar./Apr. 1999, at 39.

2. *Id.*

3. See *infra* Part III.A.4.

charge for mechanical intervention is a 2000 federal law that forces filters into public libraries and public school libraries nationwide this year, as a condition of federal funding.

That law, buried in a major appropriations bill,⁴ combines the Children's Internet Protection Act⁵ and the Neighborhood Children's Internet Protection Act⁶ (together, CIPA, also known as CHIPA). CIPA marks Congress's third attempt to regulate the Internet in the name of child protection, the former two attempts having been stymied by the courts. The bill containing CIPA passed with a comfortable margin of support in the last weeks of 2000,⁷ despite strident objections from the ALA⁸ and a warning from Congress's own designated research commission that filters in libraries and schools raise "significant concerns about First Amendment values."⁹

Congress was also undeterred by a 1998 federal court decision that condemned the mandatory filtering of all library computers, for all library patrons, as unconstitutional.¹⁰ Already challenged in court by the ACLU, the ALA, and others,¹¹ CIPA will force the courts to consider the

4. Consolidated Appropriations Act 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

5. Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, app. D, §§ 1701-1721, 114 Stat. 2763A-336 to -350 (2000); *see also infra* note 23.

6. Neighborhood Children's Internet Protection Act, Pub. L. No. 106-554, app. D, §§ 1731-1741, 114 Stat. 2763A-350 to -351 (2000); *see infra* note 23.

7. The House passed H.R. 4577, 106th Cong. (2000), on December 15, 2000, with 292 for, 60 against, 80 not voting (Republicans 133-51-38, Democrats 157-9-42, independents 2-0-0). 146 CONG. REC. H12,502. The Senate approved H.R. 4577 on the same day without a roll call vote. 146 CONG. REC. S11,855. Senator Wellstone objected to the omnibus appropriations bill for its "numerous other pieces of unrelated legislation" and bemoaned the lack of a roll call vote. 146 CONG. REC. S11,876. The President signed CIPA into law on December 21, 2000. Consolidated Appropriations Act 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763 (2000).

8. American Library Association (ALA) Washington Office, at <http://www.ala.org/washoff/-statements.html> (last visited Apr. 30, 2002) (linking to twenty statements made to Congress opposing mandatory filtering legislation); ALA Washington Office, Office of Government Relations, *Issue Brief, Librarians Oppose Federal Internet Filtering Mandates* (July 2000), at <http://www.ala.org/washoff/intellectualfreedom.pdf> (last visited Apr. 30, 2002).

9. COMMISSION ON CHILD ONLINE PROTECTION, REPORT TO CONGRESS 20 (Oct. 20, 2000), available at <http://www.copacommission.org/report/COPAreport.pdf> (last visited Apr. 30, 2002).

10. *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 556 & n.2 (E.D. Va. 1998) (*Mainstream Loudoun II*).

11. Complaint for Declaratory and Injunctive Relief, *Am. Library Ass'n v. United States*, No. 01-CV-1301 (E.D. Penn. 2001), available at <http://www.ala.org/cipa/cipacomplaint.pdf> (last visited Apr. 30, 2002) [hereinafter ALA Compl.]; Complaint for Declaratory and Injunctive Relief, *Multnomah County Pub. Library v. United States*, No. 01-CV-1322 (E.D. Penn. 2001), available at <http://www.aclu.org/court/multnomah.pdf> (last visited Apr. 30, 2002) [hereinafter Multnomah Compl.].

First Amendment role of libraries in American society. That issue has troubled judges, scholars, and librarians since a fractured Supreme Court ruling in 1982¹² created as many questions about library law as it answered.¹³

A California court recognized that public libraries are in a “damned if you do, damned if you don’t” position regarding Internet filters,¹⁴ because a library might be sued for filtering or for not filtering. In fact, libraries have already faced suits for their decisions on filtering Internet access. The ACLU successfully sued a library in Loudoun County, Virginia, for restricting patrons to filtered access.¹⁵ Meanwhile, a patron in Livermore, California, sued (unsuccessfully) a library for not filtering her son’s access.¹⁶ Librarians in Minneapolis filed a sexual harassment claim with the Equal Employment Opportunity Commission (EEOC) over unfiltered access there.¹⁷ The California court dismissed the Livermore suit,¹⁸ but the EEOC ruled preliminarily in favor of the Minneapolis complainants.¹⁹ Furthermore, libraries struggling with

12. Bd. of Educ., *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 855, 875, 878, 883, 885 (1982).

13. Though CIPA concerns minors’ rights in the library, as well as adults’ rights, neither the ALA nor the ACLU has challenged CIPA’s application to public school libraries. Jenner & Block, CIPA Frequently Asked Question #3, CIPA and School Libraries, at <http://www.ala.org/cipa/cipafaq3.html> (last visited Apr. 30, 2002); see *Multnomah Compl.*, *supra* note 11, at 2–4. Because minors’ rights and school law raise legal issues that muddy the CIPA question, the ACLU has decided to pursue first only the more straightforward public library case. Interview with Chris Hansen, National ACLU attorney, in Minneapolis, Minn. (Aug. 8, 2001).

The prospect of raising the school law question both excites and frightens student-rights activists, who have witnessed a steady decline in minors’ constitutional entitlements in the fading glow of the civil rights era. See, e.g., Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the “College Hazelwood” Case*, 68 TENN. L. REV. 481, 495–500 (2001). See generally Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 28 DRAKE L. REV. 527 (2000); Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate: Students’ Rights Thirty Years After Tinker v. Des Moines Independent Community School District*, 48 DRAKE L. REV. 445 (2000).

14. *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 776 (Cal. Ct. App. 2001).

15. *Mainstream Loudoun II*, 24 F. Supp. 2d 552.

16. *Kathleen R.*, 104 Cal. Rptr. 2d 772. See generally Junichi P. Semitsu, Note, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509, 521–24 (2000).

17. See generally, e.g., Carl S. Kaplan, *Cyber Law Journal: Controversial Ruling on Library Filters*, N.Y. TIMES, June 1, 2001 (on file with author).

18. *Kathleen R.*, 104 Cal. Rptr. 2d at 784.

19. See generally Kaplan, *supra* note 17. See generally Kim Houghton, Note, *Internet Pornography in the Library: Can the Public Library Employer Be Liable for Third-Party Sexual Harassment When a Client Displays Internet Pornography to Staff?*, 65 BROOK. L. REV. 827 (1999). The National Law Center for Children and Families (NLC) uses the threat of such

filtering face local community groups forming picket lines,²⁰ national organizations prepared to fund trench political warfare,²¹ board members and state legislators who want to look like they are doing something about "the problem,"²² and now a bipartisan federal mandate that usurps local control.²³

The purpose of this Article is to demonstrate the unconstitutionality of mandatory Internet filtering for adult patrons of the public library. This proposition is not original, but merits further development amid the continuing tug of war between filtering proponents and opponents. Part II describes the technology of Internet filtering, establishing a vocabulary with which to address the legal problems and studying the efficacy of filtering. Part III describes the current law, state and federal, statutory and judicial, pertinent to Internet filtering, including pending litigation. Part IV argues that the 1998 federal decision against mandatory filtering was correctly decided, exploring scholarly criticism and dispelling a common misperception of the court's reasoning. Part IV

complaints, as well as of criminal prosecution, to press libraries to filter. See NLC, NLC MEMORANDUM OF LAW ON LEGAL ISSUES INVOLVING THE USE OF FILTERING SOFTWARE BY LIBRARIES, SCHOOLS, AND BUSINESSES 20, 32-42, 56 (1999) [hereinafter NLC LEGAL MEMORANDUM], previously at <http://www.nationallawcenter.org/NLC%20Filter%20Memo%-2097%20final%20w-cover.pdf> (last visited July 20, 2001) ("[U]se of a program filter may be the best or only way to avoid liability."). The NLC goes so far as to suggest that a library that filters might have grounds to pursue Rule 11 sanctions and even a malicious prosecution countersuit against a § 1983 plaintiff who would "[use] the Civil Rights Act . . . for a wrongful collateral purpose." *Id.* at 21. It is unclear from the NLC Legal Memorandum what would constitute "a wrongful collateral purpose."

20. *E.g.*, Wayne Risher, *Library To Block Porn on Computers Open to Public*, [MEMPHIS] COM. APPEAL, Sept. 24, 1999, at A1, available at 1999 WL 22126601 (reporting that "300 placard-waving citizens rallied against pornography outside the Main Library," prompting the Memphis library board to mandate filtering unanimously).

21. *E.g.*, Lisa Singhanian, *City To Vote on Net Filters at Library*, ARK. DEMOCRAT-GAZETTE, Feb. 20, 2000, at 5A (quoting Holland, Michigan's conservative mayor referring to the "American Family Association's commando tactics").

22. *E.g.*, Harvey Rice, *Free Speech Tangled in the Web: Montgomery County Orders its Libraries To Block Internet Access to Porn Sites*, HOUSTON CHRON., Mar. 19, 2000, at 37, available at 2000 WL 4286949 (quoting library director, who stated, "I feel like Swiss cheese," after a "public chastisement" by county commissioners for "allowing access to Internet pornography").

23. CIPA, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763, 2763 (2000). On the day of its passage in Congress, CIPA was copied into §§ 1701-1741 of H.R. 5666, 106th Cong. (2000), which in turn was added as Appendix D, including CIPA, §§ 1701-1741, 114 Stat. 2763A-336 to -351, to H.R. 4577, 106th Cong. (2000), the final omnibus budget bill. CIPA's provisions were enacted at 20 U.S.C.A. § 9134 (2000) and 47 U.S.C.A. § 254 (Supp. 2001). For ease of reference, subsequent citations to CIPA will refer to §§ 1701-1741, which appear in Pub. L. No. 106-554, 114 Stat. 2763A-336 to -351 (2000).

leads to the conclusion that CIPA is, or at least should be, an impermissible infringement on the constitutional rights of the adult patrons of public libraries.

II. THE TECHNOLOGY AND EFFICACY OF INTERNET FILTERING

A. *Technology: What Filters Are and How They Work*

To understand the law regarding Internet filtering, one first must have a vocabulary for filtering technology and understand something of how filters work. Just as courts struggle to analogize the Internet to familiar media such as speech, print, and broadcast, judges and scholars invariably analogize Internet filtering to conventional restrictions on information flow—whether a parent's educational choices or a librarian's collection management. Familiarity with filtering technology facilitates understanding and analogical analysis of the pertinent law.

Derisively called *ensorware* by opponents,²⁴ Internet filters restrict access by individual computer users to the Internet.²⁵ A personal computer owner may purchase a filtering software package in a retail market or over the Internet, then run that package on a single computer with Internet access.²⁶ A filter may also run on a server computer, which intervenes between users and the Internet.²⁷ For constitutional purposes,

24. See, e.g., Censorware Home Page, at <http://www.censorware.net> (last visited Apr. 30, 2002); ELECTRONIC PRIVACY INFORMATION CENTER, CENSORWARE: A POST-CDA SOLUTION?, at http://www.epic.org/free_speech/censorware (last visited Apr. 30, 2002).

25. E.g., ACLU, CENSORSHIP IN A BOX, at <http://> (last visited Apr. 30, 2002); ALA, LIBRARIES & THE INTERNET TOOLKIT 14, at <http://www.ala.org/alaorg/oif/internettoolkit.pdf> (last visited Apr. 30, 2002); FILTERING FACTS, HOW FILTERS REALLY WORK, *previously* at <http://www.filteringfacts.org/-howfilt.htm> (last visited Sept. 13, 1999) [hereinafter FILTERING FACTS] (on file with author); see also *Reno v. ACLU*, 521 U.S. 844, 854–55 (1997) (referring to “[s]ystems . . . to help parents control the material that may be available on a home computer with Internet access”). See generally Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 652–55 (1998); Semitsu, *supra* note 16, at 513–16. For a concise description of the origin, nature, and workings of the Internet, see *Reno*, 521 U.S. at 849–52, and *In re Doubleclick Inc. Privacy Litig.*, No. 00-CIV-0641-NRB, 2001 WL 303744, at *1–2 (S.D.N.Y. Mar. 28, 2001) (describing the Internet).

26. Whitney Kaiser, *The Use of Internet Filters in Public Schools: Double Click on the Constitution*, 34 COLUM. J.L. & SOC. PROBS. 49, 52 (2000); see also, e.g., SURFCONTROL, HOME PRODUCTS, at <http://www.surfcontrol.com/home/products/> (last visited Apr. 30, 2002).

27. E.g., COMMISSION ON CHILD ONLINE PROTECTION, *supra* note 9, at 19–21; Geoffrey Nunberg, *The Internet Filter Farce: Why Blocking Software Doesn't—and Can't—Work as*

there is no significant distinction between a filter running on a single computer and a filter running on a proxy server. The filtering software that runs on each operates in the same fundamental fashion, though there might be differences between systems or products in how much control librarians can exercise over filter settings.²⁸

Filters operate either on a *black-list* principle or a *white-list* principle. Black-list filters, also called blocking filters, presume that the user is entitled to full access to the Internet, but revoke that access when the user seeks content on the "black list," that is, content that matches the filter's blocking criteria. White-list filters work inversely. They presume that a user has access to none of the Internet, then affirmatively grant the user access to content on the "white list," or "allow list."²⁹ White-list filtering has tempted librarians as a solution to legal woes, but the solution is deceptively simple and severely curtails the resources available to patrons. Naturally, a white-list filter is much more precise than a black-list filter in restricting a computer user to specified content. However, because Internet content is constantly growing and changing, a black list allows access to a vastly broader bank of content than a white list possibly could.³⁰

In today's libraries, white-list filters are best suited for the children's section,³¹ or for open-access computers dedicated to specific purposes.³² For example, a children's section computer can be dedicated to use by young children by installing a white-list filter that allows children access to specified educational games. In this way, young children can play on the Internet and become familiar with using computer controls, without being overwhelmed by jargon and subject matter beyond their comprehension. At the same time, a computer in an open access area can be dedicated to a specific use by installing an appropriate white-list filter. Libraries have long used white-list systems on open access

Promised, AM. PROSPECT, Jan. 1, 2001, at 28, 30; see also, e.g., AM. ONLINE, PARENTAL CONTROLS, at <http://www.aol.com/info/parentcontrol.html> (last visited Apr. 30, 2002).

28. See, e.g., David Bruce, *Filtering the Internet for Young People: Products and Problems*, TCHR. LIBR., May/June 1999, at 13.

29. E.g., FILTERING FACTS, *supra* note 25; Kaiser, *supra* note 26, at 54.

30. See FILTERING FACTS, *supra* note 25; Kaiser, *supra* note 26, at 54.

31. FILTERING FACTS, *supra* note 25.

32. E.g., Mark Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Libraries Exclude?*, 78 TEX. L. REV. 1117, 1136 (2000) (suggesting a white-list filter to restrict a library terminal for patron access to recent federal court decisions posted on the Internet).

computers without Internet access—for example, a filter that restricts an ordinary computer to access only the library's catalog, or only the InfoTrac periodical database. Such resources now typically “reside” at the library via the Internet.

These uses of white-list filters raise no censorship concerns because they are selection decisions of the kind librarians make routinely.³³ At least one private company has set out to create an expansive white-list filter for adult patrons in public libraries, called “The Library Channel.”³⁴ The formidable task requires systematic evaluation of web pages in a human selection process like that which librarians currently apply to books. The size and protean nature of the Internet make the task almost impracticable. By November 1999, 112 participating libraries had cataloged 26,000 sites:³⁵ impressive, but futile against the backdrop of hundreds of millions of web pages.

While white-list filters give rise to little more legal wrangling than the traditional library selection process, black-list filters are another matter. The black-list filter signifies affirmative exclusion, some say removal, of content from the library collection.³⁶ Thus, when referring to filtering in subsequent parts, this Article means black-list filtering, unless specified otherwise.

Besides the distinction between black-list and white-list filters, filters may operate either based on content or based on *protocol*.³⁷ Understanding protocol distinctions is important, because the legitimate power of librarians to restrict protocol access is easily but mistakenly confused with unconstitutional content-based restriction. The Internet offers various protocols, or media of communication. Well-known protocols include the World Wide Web, electronic mail, newsgroups,

33. See *infra* Part IV.E.

34. See, e.g., Nadel, *supra* note 32, at 1136; see also Mary Minow, *Filters and the Public Library: A Legal and Policy Analysis*, FIRST MONDAY (1997), at http://www.firstmonday.dk/issues/issue2_12/minow/index.html (last visited Apr. 30, 2002) (discussing the Library Channel as a selection device); Semitsu, *supra* note 16, at 541–42.

35. Nadel, *supra* note 32, at 1136. According to Nadel, the Columbus Public Library in 2000 had a white list of some 30,000 websites. *Id.*

36. “[In a limited public forum library,] filtering is reactive rather than proactive, designed to prevent access to certain information rather than assisting in its use.” Jeannette Allis Bastian, *Filtering the Internet in American Public Libraries: Sliding Down the Slippery Slope*, FIRST MONDAY (1997), at http://www.firstmonday.dk/issues/issue2_10/bastian/index.html (last visited Apr. 30, 2002).

37. See, e.g., *id.*; FILTERING FACTS, *supra* note 25; Kaiser, *supra* note 26, at 54; see also Minow, *supra* note 34.

and chat.³⁸ Protocol blocking does not usually pose a legal concern, because the decision to block a protocol is unrelated to the content of the communication. Rather, a library typically blocks a protocol, such as e-mail or chat, so that computer resources can be dedicated to research rather than communication.³⁹ This dedication is again akin to the pre-Internet reservation of a computer for a specified purpose, such as a computer dedicated to periodical searches rather than programming or calculating. Chat can be analogized to a town hall meeting, which a library need not host, but may. If a library does allow computers to be used for chat, then First Amendment protections against content and viewpoint discrimination are triggered the same as they would be for a town hall meeting. Hence, when referring to filtering in subsequent parts, this Article means content-based filtering—and usually, content filtering of the World Wide Web—when not specified otherwise.

A black-list content filter employs one or more methods of filtering, or blocking, including: *site blocking*, *word blocking*, and *rating blocking*. All three raise constitutional issues.

Site blocking involves filtering websites according their specific identities or addresses.⁴⁰ Site blocking is the least overinclusive method of filtering because blocked sites are selected individually by human reviewers.⁴¹ However, site blocking suffers flaws similar to white-list filtering. The size of the Internet makes human assessment of every website impossible, and the protean nature of the Internet can quickly outdate a site-blocking decision.⁴² Of legal significance, site-blocking decisions for commercial software are made in the first instance by

38. See *Reno v. ACLU*, 521 U.S. 844, 851–53 (1997).

39. A library might legitimately block file transfer protocols for fear of exposing the system to a computer virus.

40. E.g., *ACLU, CENSORSHIP IN A BOX*, *supra* note 25; Bastian, *supra* note 36; *FILTERING FACTS*, *supra* note 25; Kaiser, *supra* note 26, at 53; see also Minow, *supra* note 34 (describing both site and host blocking as “host blocking”).

41. See *FILTERING FACTS*, *supra* note 25; Minow, *supra* note 34. Professor Minow compares site review with “the early history of motion picture review when censors watched reels of film, to make sure enamored couples always kept one foot on the floor.” Minow, *supra* note 34.

42. E.g., Kaiser, *supra* note 26, at 53. Professor Minow recounts a campus joke at Stanford University, where students labored to develop SurfWatch’s original site blocking list. See Minow, *supra* note 34. Students “refer[red] to the filtering industry as the full employment act for Stanford students—while some screen out objectionable sites, the rest create and relocate them.” *Id.*

employees of the commercial vendors, not by public librarians.⁴³ A vendor guards its list of blocked sites as a secret, proprietary product of labor-intensive investment.⁴⁴ Flexible filtering software typically permits a system administrator to unblock desired sites or to augment the list of blocked sites.⁴⁵

Related to site blocking, *host blocking* is a prophylactic variation in which all of the websites published by a particular host are blocked after one web page or website from that host is identified for blocking.⁴⁶ Naturally, host blocking lacks the “less overinclusive” appeal of site blocking, and has drawn fire for casting such a wide net. For instance, one Oregon Republican reversed his formerly pro-filtering stance when his campaign site was blocked; software provider Surfwatch declared him a victim of his web host, which featured some sites with pornographic content.⁴⁷

Word blocking, also called *keyword blocking*, essentially looks for objectionable words and blocks websites that contain those words.⁴⁸ As an example, a word-blocking filter might block references to “sex” or “breast.”⁴⁹ In fact, word-blocking filters are more sophisticated. Using proprietary, secret formulas, filters take account of context by, for

43. See Bastian, *supra* note 36 (citing KAREN SCHNEIDER, TIFAP: THE INTERNET FILTER ASSESSMENT PROJECT SUMMARY REPORT, PHASE 2, at www.bluehighways.com/tifap/allreports.html (last visited Apr. 30, 2002)).

44. E.g., Kaiser, *supra* note 26, at 54. Of course, clever users can reverse engineer a filter’s block list. The tools and fruits of such efforts have been suppressed by copyright law. E.g., *Microsystems Software, Inc. v. Scandinavia Online AB*, 98 F. Supp. 2d 74, 74–75 (D. Mass. 2000); Nunberg, *supra* note 27, at 29 (citation omitted). See generally CyberPatrol Lawsuit Archive, at <http://www.politechbot.com/cyberpatrol> (last visited Apr. 30, 2002). Nunberg asserts that secrecy is less about protecting intellectual property than about preventing the public from “rapidly see[ing] just how inadequate the[] software is.” Nunberg, *supra* note 27, at 30–31. Indeed, one reason why filters perform so badly is that the software makers’ ability to keep their performance a secret has up to now exempted them from the competitive pressures that would ordinarily force them to bring their products up to the level of other kinds of language software. *Id.* at 33. But not all filters keep their lists secret, and not all are in it for the money. For example, NetNanny makes its list public. *Digital Chaperones for Kids*, CONSUMER REP., Mar. 2001, at 22. Likewise, the Library Channel white list is not secret. Nadel, *supra* note 32, at 1151.

45. See, e.g., Bruce, *supra* note 28, at 13.

46. See Bastian, *supra* note 36.

47. John Schwartz, *Internet Filters Used to Shield Minors Censor Speech, Critics Say*, N.Y. TIMES, Mar. 19, 2001, available at 2001 WL 17362447 (discussing “pollock4congress.com”) (on file with author). “What he once thought of as protection, he said, now looked a lot like censorship.” *Id.*

48. E.g., ACLU, CENSORSHIP IN A BOX, *supra* note 25; Bastian, *supra* note 36; FILTERING FACTS, *supra* note 25; Kaiser, *supra* note 26, at 53.

49. See Minow, *supra* note 34 (referring to keyword blocking as “a shotgun approach”).

example, checking how many times the word "sex" appears and whether it appears in the vicinity of other suspect words.⁵⁰ Thus, the filter should be able to distinguish between a website about tourist attractions in "Essex," or about "breast cancer," and sites with pornographic content.

In practice, however, these distinctions often elude automated filters, revealing word blocking's fatal flaw and providing fodder for filtering opponents.⁵¹ One renowned error occurred when filters blocked the National Aeronautics and Space Administration's Mars Explorer site; the web address omitted the space in "marsexplorer."⁵² Filtering Facts, a now-defunct organization that once led the charge for Internet filtering in public libraries, stated as early as 1999 that word blocking "must be turned off in a library setting."⁵³ A scholar more recently noted that word blocking has "fallen out of favor."⁵⁴ However, word blocking is still employed, at a minimum to locate sites for human site-blocking review,⁵⁵ and perhaps to shore up thin site-block lists.⁵⁶

Besides the inherent limitation in a computer's ability to assess context as thoroughly as a human being, a serious limitation on word-blocking filters is their inability to evaluate images; thus, a website consisting of no words but only objectionable photographs or other graphics would escape detection by a word-blocking filter. Software makers once trumpeted a filter that could analyze images, but it proved

50. This methodology is sometimes called "fuzzy logic." E.g., Nadel, *supra* note 32, at 1120; cf. Bruce L. Plopper & Lauralee McCool, *The Impact of Fuzzy Logic on Student Press Law*, JOURNALISM & MASS COMM. EDUCATOR, Winter 2001, at 4 (adapting the mathematical theory of fuzzy logic to examine First Amendment case law).

51. E.g., Minow, *supra* note 34 ("In fact, the English language bursts with words and phrases with double and triple meanings, supplying the country's comics with endless double entendre material for their nightly performances.").

52. Mike Martindale, *Internet Smut Law Disturbs Librarians: Designed To Protect Children, Measure Blocks Access to Legitimate Data, Too*, DETROIT NEWS, Nov. 5, 2000 (on file with author). In a similar vein, Los Angeles law firm librarian Bob Ryan found SmartFilter blocking the innocent site Animals Exotic and Small. Posting of Robert S. Ryan, Rryan@HFBLLP.COM, to law-lib@ucdavis.edu (last visited Apr. 28, 2000) (on file with author). Ryan observed that "apparently [SmartFilter] doesn't think I should be accessing a site about AnimalSex, otic or small." *Id.*

53. FILTERING FACTS, *supra* note 25.

54. Kaiser, *supra* note 26, at 53.

55. E.g., Bastian, *supra* note 36; Jonathan D. Wallace, *Purchase of Blocking Software by Public Libraries Is Unconstitutional* (1997), at <http://www.spectacle.org/cs/library.html> (last visited Apr. 30, 2002).

56. See, e.g., Minow, *supra* note 34 (describing filters as "an amalgamation of keyword and site blocking"); Nunberg, *supra* note 27, at 30-32 (asserting that filter developers could not possibly use site blocking alone to review a useful fraction of web content).

ineffective in practice.⁵⁷ Instructing a computer to analyze color and shade to distinguish an underarm from genitalia has proven no small feat; instructing a computer to distinguish an artist's nude from a pornographer's nude might be impossible.⁵⁸

Rating blocking restricts access to websites based on the sites' ratings, that is, ratings in the same sense as "PG" and "R" are ratings for movies.⁵⁹ Ratings have promise as a mechanism to aid parents in selecting web content for their children, just as the voluntary ratings on movies and television programs have provided parents with additional guidance in selecting programming for their children.⁶⁰ The dominant standard for Internet rating is provided by the Platform for Internet Content Selection (PICS), developed by AT&T and Massachusetts Institute of Technology researchers. PICS provides "little more than the syntax and protocols used" in rating and is intended to serve as "the underlying standard" for any number of "third-party rating systems."⁶¹ "By far the largest [such system] is sponsored by the Recreational Software Advisory Council on the Internet," which "comes pre-installed in all versions of Microsoft's Internet Explorer."⁶²

Filtering through ratings seriously threatens to "flatten speech on the Net, disproportionately excluding speech that was not created by commercial providers for a mass audience."⁶³ Requiring Internet content authors to rate their own content according to a uniform scheme raises an insurmountable problem of unconstitutionally-compelled speech.⁶⁴

57. See Nunberg, *supra* note 27, at 32 ("In 1999 Exotrope, a company in Elmira, New York, introduced a system called BAIR (for Basic Artificial Intelligence Routine), which it billed as capable of recognizing pornographic images with 99 percent accuracy, thanks to its use of artificial intelligence and 'active information matrices.'").

58. See *id.* ("In the end, BAIR is just a system that can identify flesh tones with less than 70 percent accuracy—about par for the present state of image recognition, and miles short of a system that could reliably tell the difference between stills from *Deep Throat* and from *My Dinner with André*.").

59. See, e.g., Minow, *supra* note 34. See generally Semitsu, *supra* note 16, at 516–19.

60. See generally Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453 (1997), available at <http://www.law.wayne.edu/weinberg/rating.htm>, cited in Minow, *supra* note 34.

61. R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 764, 767 (1999). See generally *id.* at 760–71 (explaining Internet rating and especially detailing PICS).

62. *Id.* at 767–68. The White House has supported building PICS into web browsers. Minow, *supra* note 34.

63. Weinberg, *supra* note 60, at 482.

64. E.g., Minow, *supra* note 34 ("Major news organizations . . . have gone on record stating that they would rather 'go dark' than self-rate their news stories for sex and violence."); cf. *Hearing on National Independent Council for Entertainment in Video Devices Act of 1993 Before Senate*

Furthermore, any government enforcement of a rating mechanism would surely fail for the same reasons government cannot institutionalize a motion picture rating system.⁶⁵ Alternatively, the rating of every website by some third party is no different from site blocking, raising the same mechanical and legal issues. Rating further poses the same problems that slowed its adoption in television, such as the perennial question of “what is news?” (News and sports programs on television carry no ratings.⁶⁶) On the Internet, the problem is compounded, as *The New York Times on the Web*⁶⁷—the electronic outlet for the staunchly traditional and highly regarded newspaper of record—stands on equal footing with *RumorsRumorsRumors*, a web publication touting the latest in celebrity gossip and conspiracy theories.⁶⁸

An Internet filter of acceptable quality typically offers a flexible combination of the mechanisms and methods described here, ready to be customized by a system administrator. For example, CyberPatrol, in the SurfControl family of products,⁶⁹ is a market leader in home Internet filters.⁷⁰ A parent who purchases CyberPatrol can install the software on his or her home computer and becomes the system administrator.⁷¹ The

Government Affairs Committee, Dec. 9, 1993, available at 1993 WL 664384 (testimony of Robert S. Peck, ACLU, asserting unconstitutionality of mandatory video game self-rating). While the problem of compelled speech strongly indicates that mandatory self-rating is unconstitutional, other arguments point to the same conclusion. See Wagner, *supra* note 61, at 779–801; see also Lessig, *supra* note 25, at 658–65 (explaining PICS’s incompatibility with free expression). But see Wagner, *supra* note 61, at 777–812 (discussing numerous strategies by which the government might act indirectly to achieve mandatory self-rating without running afoul of the First Amendment); J.M. Balkin et al., *Filtering the Internet: A Best Practices Model* (1999) (outlining a rating system purportedly sensitive to civil liberties issue), previously at <http://infosociety.law.yale.edu/-Filtering5.rtf> (last visited July 19, 2001).

65. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–06 (1952) (holding unconstitutional state licensing scheme for motion pictures); *Motion Picture Ass’n of Am. v. Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970) (rejecting as unconstitutionally vague state adoption of motion picture rating system into criminal film exhibition law).

66. *In re Implementation of Section 551 of the Telecommunications Act of 1996*, 13 FCC Rec. 8232, paras. 7, 21, available at 1998 WL 110188.

67. The New York Times on the Web Home Page, at <http://www.nytimes.com/> (last visited Apr. 30, 2002).

68. RumorsRumorsRumors Home Page, at <http://www.rumorsrumorsrumors.com/> (last visited Apr. 30, 2002).

69. SURFCONTROL, PRODUCT OVERVIEW, at http://www.surfcontrol.com/home/products/cyber_patrol_web.asp (last visited Apr. 30, 2002).

70. See, e.g., Bastian, *supra* note 36.

71. The following explication documents the author’s personal experience with CyberPatrol version 4.0, except where indicated.

administrator has access to the CyberPatrol "Headquarters" screen, where filtering criteria may be customized. In this password-protected area, an administrator can restrict user access to the Internet by time, protocol, and content. By time, the administrator can restrict the user to certain hours or a number of hours of the day or week. The administrator can restrict access to protocols: chat, the web, file transfers, newsgroups, games, and applications. And simply by checking a box, the administrator can restrict access on a content basis according to any of twelve categories, or combination thereof: "violence/profanity," "partial nudity," "full nudity," "sexual acts/text," "gross depictions/text," "intolerance," "satanic or cult," "drugs/drug culture," "militant/extremist," "sex education," "questionable/illegal & gambling," and "alcohol & tobacco." When a user attempts to access prohibited content, CyberPatrol presents a "Checkpoint" screen, and the content is blocked. To control access according to its content classification scheme, CyberPatrol uses its proprietary "CyberNOT" list, a site-blocking tool. The latest home version of CyberPatrol offers keyword filtering as an option that may be turned off.⁷²

An example of a network filter is Bess, a product of N2H2,⁷³ employed by, among many clients,⁷⁴ the State of Arkansas Department of Information Services (Arkansas DIS).⁷⁵ By spring 2001, Arkansas DIS had made Bess available to the state's 310 school districts, and 297 had adopted it.⁷⁶ The state has since passed legislation that resembles the

72. SURFCONTROL, CYBERPATROL FOR HOME, at http://www.surfcontrol.com/home/products/cyber_patrol_web.asp (last visited Apr. 30, 2002). This feature was not available when I tested the product.

73. N2H2, ALL PRODUCTS, previously at http://www.n2h2.com/solutions/all_products.html (last visited July 20, 2001).

74. Thanks to CIPA, N2H2's business is booming; Bess provides filtering for 16.5 million school children. *Marketplace Morning Report* (National Public Radio broadcast, Jan. 25, 2002), transcript available at 2002 WL 4428769. Filtering companies also have growing markets in the corporate world, where executives want to restrict or monitor employees' surfing habits, and in foreign countries, such as Saudi Arabia, where the government is not as deferential to individual liberty as the United States. John Carroll, *Block That Slacker: Snooping on the Excessive Internet Habits of Corporate Employees Grows Big Market for Site-Filtering Software*, SOUTHWEST AIRLINES SPIRIT, Oct. 2001, at 34; Jennifer Lee, *Companies Compete To Provide Saudi Internet Veil*, N.Y. TIMES, Nov. 19, 2001 (on file with author).

75. RAYMOND SIMON, ARKANSAS DEPARTMENT OF EDUCATION, DIRECTOR'S COMMUNICATION, MEMORANDUM NO. DIR-00-012 (Sept. 22, 1999), available at <http://arkedu.state.ar.us/dirmemos/static/fy9900/441.html> (last visited Apr. 30, 2002).

76. Hearing on H.B. 1003 Before Ark. Senate Tech. Comm., Feb. 6, 2001 (testimony of Drew Mashburn, Arkansas Department of Information Systems, as witnessed by author) [hereinafter Mashburn Testimony].

CIPA, though lacking any hinge on government funding and pertaining only to public school libraries, pursuant to pending state regulations.⁷⁷ Under Arkansas DIS's arrangement with N2H2, Bess should block only material that is obscene or harmful to minors.⁷⁸ Arkansas users who find sites improperly blocked or improperly available may submit them to N2H2 for reconsideration.⁷⁹ For its part, N2H2—with seventy-five employees and eight million blocked sites⁸⁰—has told Arkansas DIS that Bess blocks only upon human review.⁸¹ Though Arkansas DIS is a public agency subject to Arkansas's strong public records law,⁸² its agreement with N2H2 does not require the company to release its block list, and N2H2 has specifically declined to do so.⁸³

B. Efficacy: What Filters Are Not and When They Don't Work

If the *raison d'être* of the Internet filter is to stop users from seeing sexual content that the law forbids them to see, then filters have failed to fulfill their purpose. Not only are they incapable of applying peculiarly human legal definitions in content analysis, they are too easily circumvented by intelligent, determined users and content providers. Filters can be an effective aid for well-meaning parents who understand the advantages and limitations of the technology, but filters are no more law enforcement tools than filter makers are police. Even filter vendor SurfControl opposed legislative imposition of filtering in public libraries.⁸⁴

77. 2001 Ark. H.B. 1003 (codified at ARK. CODE ANN. §§ 6-21-111, 13-2-104(a) (Michie Supp. 2001)).

78. Mashburn Testimony, *supra* note 76.

79. ARK. DIS, INTERNET CONTENT FILTERING FAQ, at <http://www.dis.state.ar.us/proj%-5filtering/faq.htm> (last visited Apr. 30, 2002).

80. Hearing Before Senate Commerce Comm., May 20, 1999, available at 1999 WL 321652 (testimony of Peter Nickerson, N2H2).

81. Mashburn Testimony, *supra* note 76.

82. See *City of Fayetteville v. Edmark*, 801 S.W.2d 275, 277–80 (Ark. 1990) (allowing newspaper access to litigation file in hands of private law firm retained by city, despite attorney-client privilege).

83. E-mail from Drew Mashburn, Arkansas DIS, to the author (Feb. 23, 2001, 4:23 p.m. CST) (forwarding e-mail from “Kelly” at N2H2, to Rick Martin of the Arkansas Department of Education (Feb. 23, 2001 11:10 a.m. PST)) (on file with author).

84. See, e.g., Schwartz, *supra* note 47 (quoting SurfControl's Susan Getgood as stating, “[w]e make software, not policy”). However, SurfControl's opposition has not kept it from marketing “CyberPatrol for Education” and offering a free package called “Town Meeting in a Box” public

In 1999 and 2000, this author conducted an unscientific test of CyberPatrol in anticipation of presentations to the Arkansas Library Association.⁸⁵ I used Excite.com, a popular search engine, and searched for “full nudity sexual acts text.” In 1999, I attempted to access the first ten sites generated by that search. With CyberPatrol turned off, I was able to access hardcore pornography on all ten sites within two mouse clicks of my search results. Then I turned CyberPatrol on and set it to block “full nudity” and “sexual acts/text.” The filter blocked eight of the ten sites, or their links, in time to stop me from seeing pornography. In 2000, I ran the same test and again sought to examine the top ten sites retrieved by my search. This time, the first three retrieved links took me to the same gambling site with no nudity or sexual content at all; the site’s “metatext”—encoded keywords not part of the ordinary visual display—was loaded with sexual terms to lure surfers with prurient interests. The following ten links—search retrievals four through thirteen—again provided hardcore pornography within two mouse clicks of my search results. To CyberPatrol’s credit, it correctly allowed the gambling site as not containing anything to which I objected. As for the following ten links to hardcore pornography, CyberPatrol again stopped me from perusing eight of the ten.

Those unscientific results—about an eighty percent success rate for the filter, or a twenty percent success rate for the ill-intentioned user—are not far off the best numbers in filter performance according to other studies. The ALA claims that filters on average successfully block objectionable sites about eighty percent of the time.⁸⁶ In a *Consumer Reports* test, SurfWatch performed the best of the tested filters with an eighty-two percent success rate at blocking sites investigators deemed inappropriate for minors.⁸⁷ CyberSitter was successful sixty-three percent of the time, while NetNanny failed to block any of the sites rated inappropriate.⁸⁸ These numbers reveal software makers’ claims, which typically run in the ninety-percent range, to be “wildly exaggerated,” says Geoffrey Nunberg, Xerox scientist and consulting professor of

hearing survival kit” to show librarians and educators how CyberPatrol can aid in CIPA compliance. SURFCONTROL, CYBERPATROL FOR EDUCATION: PRODUCT OVERVIEW, at http://www.surfcontrol.com/products/cyberpatrol_for_education/product_overview/index.html (last visited Apr. 30, 2002); SURFCONTROL, CYBERPATROL FOR EDUCATION: SPECIAL OFFERS (on file with author).

85. Data on file with the author.

86. See ALA, LIBRARIES & THE INTERNET TOOLKIT, *supra* note 25, at 2.

87. Nunberg, *supra* note 27.

88. *Id.*

linguistics at Stanford University.⁸⁹ On the one hand, a blocking success rate of about eighty percent means that a filter will stop a child user from accessing a pornographic website four out of five times. On the other hand, a determined child need try to access pornography only five times to succeed once.

Filters also improperly block otherwise acceptable sites. One study found that of 1000 random websites in the dot-com domain, SurfWatch mistakenly blocked more than four out of five as "sexually explicit," including a limousine service, an antiques dealer, and a storage company.⁹⁰ Peacefire, a filtering opponent,⁹¹ has claimed that CyberPatrol mistakenly blocked sites about a third of the time, perceiving sexual content in the home pages of a lawyer and a home inspection service.⁹² A Peacefire study of filter I-Gear found a three-in-four misclassification rate of the first fifty websites in the dot-edu domain, including, ironically, a Latin passage from Saint Augustine "in which the bishop chastises himself for his impure thoughts."⁹³ Censorware studied SmartFilter, software used in Utah public schools to block "sex, gambling, criminal skills, hate speech, and drugs";⁹⁴ the filter detected those elements amid a distinguished reading list that included "the Declaration of Independence, the United States Constitution, the Bible, the Book of Mormon, [and] the Koran."⁹⁵

Anecdotal evidence has done more than science to subject filters to public humiliation—such as when the Chicago Public Library

89. *Id.*

90. *Id.* at 30.

91. See Peacefire Home Page, at <http://www.peacefire.org> (last visited Apr. 30, 2002); see also David Kushner, *Fired Up*, PLAYBOY.COM (June 26, 2001), at <http://www.5.playboy.com/digital/dotcomment/peacefire> (no longer at this address; on file with author) (interviewing Peacefire founder Bennett Haselton).

92. D. Ian Hopper, *Internet Filtering Plan Hits Snag*, ASSOCIATED PRESS, Oct. 23, 2000, available at 2000 WL 28614922.

93. Nunberg, *supra* note 27, at 30–31. Nunberg suggests that the Latin preposition "cum" triggered the filter. *Id.* at 31.

94. Adam Horowitz, *The Constitutionality of the Children's Internet Protection Act*, 13 ST. THOMAS L. REV. 425, 433 (2000) (citing Glen Warchol, *Report Says Internet Filter Used in Utah Schools Is a Prude: Internet Filter Used in Schools Blocked the Bible*, SALT LAKE TRIB., Mar. 23, 1999, at A1, available at 1999 WL 3352942).

95. *Id.* (citing CENSORWARE, CENSORED INTERNET ACCESS IN UTAH PUBLIC SCHOOLS AND LIBRARIES (1999), previously at <http://censorware.net/reports/utah/main.html> (last visited July 20, 2001)).

discovered its own site blocked by the library's filter.⁹⁶ No discussion of filtering efficacy can be complete without the re-telling of how, in a "pleasing irony," CyberPatrol blocked the website of the American Family Association (the AFA), a leading filtering proponent.⁹⁷ The AFA website⁹⁸ drew a block under CyberPatrol's category restriction for "intolerance," because of the AFA's anti-homosexual rhetoric.⁹⁹ The AFA appealed to CyberPatrol's review committee,¹⁰⁰ asserting a Biblical basis for the AFA's position, to no avail.¹⁰¹ The Gay and Lesbian Alliance Against Defamation (GLAAD) invited the AFA to partner in GLAAD's fight against Internet censorship, but the AFA declined.¹⁰²

If filters such as Bess and CyberPatrol claim to have subjected all blocked sites to human review, how does over-inclusive blocking occur? CyberPatrol's blocking of the AFA site based upon intolerance is understandable as a difference of opinion. We can give CyberPatrol the benefit of the doubt and say that it had not yet made keyword filtering an option to turn off when it blocked *Explore Underwater* magazine, the MIT Project on Mathematics and Computation, and the U.S. Army Corps of Engineers Construction Engineering Research Laboratories.¹⁰³ But did a Bess human reviewer decide to block *Mother Jones* magazine, the Institute of Australasian Psychiatrists, and the Eustis Panthers high school baseball team?¹⁰⁴ Unlikely, despite filter makers' claims.¹⁰⁵

96. See ALA, LIBRARIES AND THE INTERNET TOOLKIT, *supra* note 25, at 15 (on file with author); see also ALA, *A Message from the ALA*, reprinted in New Mexico State Library, at <http://www.stlib.state.nu.us/libraryservices/develop/CIPAala.pdf> (last visited Apr. 30, 2002). Another ironic story recounts the conversion of a pro-filtering politician to the anti-filtering camp when his website was blocked. See *supra* note 47 and accompanying text. Yet another embarrassing moment for filters came when Beaver College in Beaver County, Pennsylvania, changed its name, in part blaming filters; prospective students and college alumni were blocked from the website when filters misperceived a slang reference to female genitalia. Craig Bicknell, *Beaver College Not a Filter Fave*, WIRED, Mar. 22, 2000, <http://www.wired.com/news/politics/0,1283,35091,00.html>.

97. E.g., Edward Cohn & Sylvia Weedman, *By Their Own Weapon*, AM. PROSPECT, Sept. 1998, at 19.

98. AFA Home Page, at <http://www.afa.net> (last visited Apr. 30, 2002).

99. See Cohn & Weedman, *supra* note 97, at 19.

100. ACLU, CENSORSHIP IN A BOX, *supra* note 25.

101. Cohn & Weedman, *supra* note 97, at 19.

102. *Id.*

103. CyberPatrol once blocked each of these sites and many more as full nudity or sex acts, according to a Censorware investigation. CENSORWARE PROJECT, BLACKLISTED BY CYBERPATROL, Introduction (1997), previously at <http://censorware.net/reports/cyberpatrol/intro.html> (last visited July 19, 2001).

104. Bess once blocked each of these sites and many more as pornography, according to a Censorware investigation. CENSORWARE PROJECT, PASSING PORN, BANNING THE BIBLE (2000), previously at <http://censorware.net/reports/bess/> (last visited July 19, 2001).

Nunberg concluded that only with keyword filtering could filters offer the "comprehensive coverage" they promise.¹⁰⁶

By its sheer size and protean nature, the Internet defies human review. An estimated 1.5% of the web is pornographic,¹⁰⁷ amounting to "a highly conservative estimate" of 150,000 to 200,000 websites with pornographic content.¹⁰⁸ At that, the average life of a website is only seventy-five days, as sites start, stop, and change addresses.¹⁰⁹ According to Nunberg, "That's more than anyone could possibly track."¹¹⁰ A powerful search engine such as AltaVista.com indexes only about 15% of the web, and all search engines cover less than half the web.¹¹¹ Even then, "a filtering company would require a full-time staff of more than 2000 people just to check out the two million new pages that are added every day."¹¹² Censorware concurs, observing that 750 people would have to work 24 hours a day, seven days week, each reading and rating two web pages a minute, just to keep up with additions to the web.¹¹³ Considering an N2H2 staff of 15 full-timers and 58 part-timers,

105. See Nunberg, *supra* note 27, at 30-32.

106. *Id.* at 31-32.

107. *Id.* at 31 (citing Steve Lawrence & C. Lee Giles, *Accessibility of Information on the Web*, NATURE, July 8, 1999, at 107); see also Michael Schuyler, *Porn Alley: Now at Your Local Public Library*, COMPUTERS IN LIBR., Nov./Dec. 1999, at 32, 34. This number rates considerably lower than the absurdly high eighty percent asserted by what Schuyler dismisses as the "Anti-Porn Cult," members of which see "pornography everywhere they turn." Schuyler, *supra*, (criticizing Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995), cited in Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, available at 1995 WL 9021173); see also Philip Elmer-De Witt, *Fire Storm on the Computer Nets: A New Study of Cyberporn, Reported in a Time Coverstory, Sparks Controversy*, TIME, July 24, 1995, available at 1995 WL 9021275 (challenging credibility of both Rimm and his study). In her debut television show, radio personality Dr. Laura Schlessinger made much ado about online pornography. *Dr. Laura Show: Lewd Libraries* (Paramount syndicated broadcast, Sept. 15, 2000) (on file with author). Her claims too proved biased and grossly exaggerated. See Posting of Robert S. Willard, Executive Director, National Commission on Libraries and Information Science, forwarded by Samuel Trosow (Sept. 14, 2000) (on file with author) (explaining how TV show contrived demonstration of accidental encounter with pornography on Internet and sensationalized risk to children to attract audience at expense of "meaningful dialog").

108. Nunberg, *supra* note 27, at 31.

109. *Id.*

110. *Id.* at 31-32.

111. *Id.*

112. *Id.*

113. CENSORWARE PROJECT, PASSING PORN, BANNING THE BIBLE, *supra* note 104.

"[t]hey're losing ground massively unless they classify huge chunks of the web at once" ¹¹⁴ In sum, "*It can't be done.*" ¹¹⁵

Anecdotes of filter makers' blocking decisions implicate a concern even graver than whether the decisions are arbitrary: some blocking decisions might be motivated by politics or profit motive. No safeguard prevents filter makers from engaging in viewpoint-based blocking without users' knowledge. While undisclosed viewpoint biases might be tolerable, if bothersome, to consumers in the private marketplace, they are intolerable and illegal when adopted by government.

Recalling my experiments with CyberPatrol, ¹¹⁶ I found that when I set the software to block "full nudity" and "sexual acts/text," it blocked the home page of Peacefire, a fierce opponent of filtering. ¹¹⁷ Peacefire—the motto of which is, "It's not a crime to be smarter than your parents"—offers links to Censorware's damning studies on filter efficacy, including studies of CyberPatrol and Bess. ¹¹⁸ Peacefire also offers features, such as the "Blocked Site of the Day," which mock filtering software's imprecision. ¹¹⁹ Especially troublesome to filter makers such as SurfControl, Peacefire features free, downloadable software that purports to empower a user to disable filters, including CyberPatrol and SurfWatch. ¹²⁰ One must wonder whether the block against Peacefire is motivated by a desire to suppress potentially harmful criticism of filtering. Such a criterion might appeal to some parents, especially those not as technologically proficient as their children. By my category

114. *Id.* (citing N2H2 IPO filing). In a recent interview, an N2H2 official simultaneously asserted the necessity for human review, touting a 12- to 15-member staff, and conceded that N2H2 employs artificial intelligence to keep up with new web content. *Marketplace Morning Report*, *supra* note 74; see also Alvin Schrader, *Internet Censorship: Issues for Teacher-Librarians*, TCHR. LIBR., May/June 1999, at 8–9:

And [filter makers] all claim to have qualified staff. Nothing is disclosed, however, about the professional qualifications of this community, how they are selected, who selects them, what they are paid, what sort of quality control over their work is in place, or what sort of retrieval testing is done to ensure accuracy and consistency in the resulting product.

115. CENSORWARE PROJECT, PASSING PORN, BANNING THE BIBLE, *supra* note 104 (emphasis in original). Censorware further described how N2H2 contracted with Inktomi, the owner of search engine Hotbot, "to find sites for Bess to block. If you submit your site to Hotbot, N2H2's computer program will also review your site and determine whether it should be banned." *Id.*

116. See *supra* note 71 and accompanying text.

117. *Consumer Reports* questioned CyberPatrol, AOL, and CyberSitter for blocking Peacefire. *Digital Chaperones for Kids*, *supra* note 44, at 22.

118. See Peacefire Home Page, *supra* note 91.

119. *Id.*

120. *Id.*

restrictions, however, "full nudity" and "sexual acts/text" encompassed neither anti-filtering rhetoric nor incitement to imminent childish unruliness.

Filters' imprecision makes it difficult to determine whether the blocking of anti-filtering websites results from error or deliberate bias, but there are ample troubling instances to suggest the latter. Besides Peacefire, according to Censorware, CyberPatrol blocked Planned Parenthood and sites about AIDS and the environment,¹²¹ all organizations friendly with the political left. Censorware detected Bess blocking the website of Feminists Against Censorship and the websites of two anti-censorship activists.¹²² Filter SafeSurf blocked the Wisconsin ACLU; I-Gear blocked the Electronic Information Privacy Center (EPIC); and SafeClick blocked congressional testimony unfavorable to mandatory filtering.¹²³ As merely a collection of reports, these examples cannot prove a viewpoint bias by filter makers. But they do point to one of the legal impediments to government-administered filtering: because search criteria and site lists are secret, the public simply does not know why these sites were blocked.¹²⁴

121. Horowitz, *supra* note 94, at 434 (citing Wagner, *supra* note 61, at 762 n.19).

122. CENSORWARE PROJECT, PASSING PORN, BANNING THE BIBLE, *supra* note 104; see also Anarchist Librarians Web Home Page, *previously at* <http://burn.ucsd.edu/~mai/library/index.html> (last visited Sept. 13, 1999) ("New Censorware.org Report Finds That This Page Is Blocked by BESS").

123. Nunberg, *supra* note 27, at 30.

124. Besides inaccuracy and possible viewpoint bias that have earned filters the wrath of free expression advocates, filters also have privacy advocates lined up against them. EPIC revealed in 2001 that N2H2, which then provided filter service to twenty percent of U.S. school districts that used filters, had amassed and sold data about its 14 million school-aged users. *Privacy Group Blasts N2H2 for Selling Schools' Web Logs*, AM. LIBR., Feb. 5, 2001, at <http://www.ala.org/online/news/2001/010205.html>; *Web Concern N2H2 to Stop Selling Data on Schoolchildren*, WALL STREET J., Feb. 26, 2001, at B9, available at 2001 WL-WSJ 2855298. N2H2 produced a product called "Class Clicks" that broke down student surfing habits by demographics, though not personal identity. *Privacy Group, supra*; Jason Anders, *Web-Filter Data From Schools Put Up for Sale*, WALL STREET J., Jan. 26, 2001, at B1, available at 2001 WL-WSJ 2852270. In December 1999, N2H2 had notified clients it would collect the information, but had said nothing about selling it. See *Privacy Group, supra*. EPIC filed Freedom of Information Act requests with the U.S. Department of Defense to find out why it bought a year's worth of the data. *Id.* N2H2 no longer sells "Class Clicks." *Web Concern, supra*.

Questionable sales practices also have evinced the disparate aims of private enterprise and public government. After Solid Oak pushed its Cybersitter in the wake of tragedies such as the Columbine High School shootings, *Salon* magazine asked, "Cagey marketers with a sharp eye for good PR opportunities, or soulless ghouls out to capitalize on any remotely Internet-related tragedy to hawk their censorware? You make the call." Andrew Leonard, *Marketing in the Wake of a Massacre*,

III. THE LAW OF INTERNET FILTERING TO DATE

A. *Statutes To Protect Minors by Regulating the Internet and Resulting Litigation*

Congress has now passed three principal laws intending to make the Internet safe for children: the Communications Decency Act of 1996 (CDA),¹²⁵ struck down in pertinent parts by the Supreme Court in *Reno v. ACLU* (*Reno*, or the CDA case);¹²⁶ the Child Online Protection Act of 1998 (COPA),¹²⁷ thus far enjoined by the federal courts¹²⁸ and pending decision this year by the Supreme Court as *Ashcroft v. ACLU* (*Ashcroft*, or the COPA case);¹²⁹ and the Children's Internet Protection Act of 2000 (CIPA),¹³⁰ now the subject of two complaints in federal district court: *American Library Ass'n v. United States* and *Multnomah County Public Library v. United States* (*ALA* and *Multnomah*, together the CIPA cases).¹³¹ Of the three, the CIPA cases most directly implicate filtering. In addition to these three federal statutes, a majority of state legislatures have attempted, in the name of protecting children, to regulate Internet

SALON, Apr. 22, 1999, at <http://www.salon.com/tech/log/1999/04/22/cybersitter/index.html> (last visited Apr. 30, 2002).

125. Pub. L. No. 104-104, §§ 501-561, 110 Stat. 52, 133-143 (1996) (codified at 18 U.S.C.A. §§ 1462, 1465, 2422 (2000), 47 U.S.C.A. §§ 223, 230, 303, 330, 531-532, 559-561 (Supp. 2001)).

126. 521 U.S. 844 (1997).

127. Pub. L. No. 105-277, §§ 1403-1447, 112 Stat. 2681-1, 2681-736 to -739 (1998) (codified at 47 U.S.C.A. §§ 230-231 (Supp. 2001)).

128. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom. Ashcroft v. ACLU*, 532 U.S. 1037 (2001) (*Ashcroft*).

129. President George Bush's Attorney General John Ashcroft was substituted for former President Bill Clinton's Attorney General Janet Reno after Bush took office in January 2001. While the Clinton Administration might have been reluctant litigants in the COPA case, Bush stated while campaigning his support for filtering. D. Ian Hopper, *Officials Soften on Web Filtering*, Oct. 20, 2000, available at 2000 WL 28614132. *But cf.* Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24 HARV. J.L. & PUB. POL'Y 503, 505 (2001) (urging President Bush to "keep[] [FCC's] hands off the Internet").

For ease of distinction between the CDA and COPA cases, this Article will refer to the latter consistently as *Ashcroft* on subsequent references, whether in the district or appellate courts, even though the COPA case was styled *ACLU v. Reno*, same as the CDA case, in the Eastern District of Pennsylvania and in the Third Circuit.

130. Pub. Law No. 106-554, §§ 1701-1741, 114 Stat. 2763A-336 to -351 (2000) (codified at 20 U.S.C.A. § 9134 (2000) and 47 U.S.C.A. § 254 (Supp. 2001)).

131. *ALA Compl.*, *supra* note 11; *Multnomah Compl.*, *supra* note 11.

content; the few state statutes passed and tested thus far in the courts have fared poorly.¹³²

1. *The CDA and Reno*

Congress passed the CDA as part of a sweeping regulatory reform effort, the Telecommunications Act of 1996.¹³³ At issue in *Reno* was 47 U.S.C. § 223, subparts (a) and (d),¹³⁴ the former "prohibit[ing] the knowing transmission of obscene or indecent messages to any recipient under 18 years of age,"¹³⁵ and the latter "prohibit[ing] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."¹³⁶ Both provisions were added as Senate floor amendments after Telecommunications Act hearings had concluded.¹³⁷

The Supreme Court struck down both provisions as unconstitutionally overbroad under the First Amendment.¹³⁸ The Court concluded as well that the provisions were vague, as an aspect of First Amendment overbreadth,¹³⁹ but formally did not reach the question of Fifth Amendment vagueness.¹⁴⁰ The lower court—a three-judge district court panel, pursuant to the CDA's own judicial review procedure¹⁴¹—had ruled in favor of the ACLU on First Amendment overbreadth and Fifth Amendment vagueness grounds.¹⁴²

132. See *infra* Part III.A.4.

133. *Reno*, 521 U.S. at 857–58 (citing Pub. L. No. 104-104, 110 Stat. 56).

134. *Id.* at 859 (citing 47 U.S.C.A. § 223(a), (d) (Supp. 1997)).

135. *Id.* (citing 47 U.S.C.A. § 223(a)).

136. *Id.* (citing 47 U.S.C.A. § 223(d)).

137. *Id.* at 858 & n.24 (citing Exxon Amendment No. 1268, 141 CONG. REC. 15536 (1995)).

138. *Id.* at 864. The forty-seven plaintiffs included the ACLU; the ALA; America Online, Inc.; American Booksellers Association, Inc.; the American Society of Newspaper Editors; CompuServe Inc.; the Critical Path AIDS Project; the Freedom to Read Foundation; Human Rights Watch; EPIC; the Electronic Frontier Foundation; the Ethical Spectacle; the Journalism Education Association; Magazine Publishers of America; Microsoft Corp.; the National Press Photographers Association; the National Writers Union; the Planned Parenthood Federation of America; Prodigy Services Co.; the Queer Resources Directory; the Society of Professional Journalists; and Stop Prisoner Rape. *Id.* at 861–62 & nn.27–28.

139. See *id.* at 870–74.

140. *Id.* at 864.

141. Pub. L. No. 104-104, § 561, 110 Stat. 142–143 (1996).

142. See *Reno*, 521 U.S. at 862–64 (citing ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996)).

The Court based its decision on two conclusions. First, the Internet warrants no diminishment in First Amendment protection, like the telephone in *Sable Communications of California, Inc. v. FCC*, and unlike the broadcast spectrum in *Red Lion Broadcasting Co. v. FCC* and *FCC v. Pacifica Foundation*.¹⁴³ Second, the CDA was overbroad in three respects: (1) the CDA was overbroad when compared to (a) the adult magazine restriction upheld in *Ginsberg v. New York*, (b) the radio indecency restriction upheld in *Pacifica*, and (c) the adult-theater zoning ordinance upheld in *Renton v. Playtime Theatres, Inc.*;¹⁴⁴ (2) the terms “indecent” and “patently offensive,” as defined, or not defined, in the statute failed to meet the precision required of harmful-to-minors regulation pursuant to *Ginsberg*, or even adult obscenity regulation pursuant to *Miller v. California*;¹⁴⁵ and (3) even had the CDA adequately defined content harmful to minors, a lack of reasonably available technology to accomplish the CDA’s objectives rendered the statute an impermissible “reduc[tion of] the adult population . . . to . . . only what is fit for children,” like the telephone indecency restriction in *Sable*.¹⁴⁶

On the first point, with respect to overbreadth, the Court ruled the CDA overbroad when compared with the restrictions upheld in *Ginsberg*, *Pacifica*, and *Renton*. In *Ginsberg*, a New York statute barred the sale of magazines obscene as to minors—or “harmful to minors” in the current parlance—to those under age seventeen.¹⁴⁷ Unlike the *Ginsberg* statute, the CDA barred even parents from communicating indecent content to their children;¹⁴⁸ the CDA was not limited to commercial transactions;¹⁴⁹ and the CDA broadened the class of minors

143. *Reno*, 521 U.S. at 868–70 (citing *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)). The Clinton Administration agreed. INFO. INFRASTRUCTURE TASK FORCE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE, *previously at* <http://www.iitf.nist.gov/eleccomm/ecommm.htm> (last visited July 17, 2001) (rejecting, in Part III.8, “content regulations traditionally imposed on radio and television”).

144. *Id.* at 864–68 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968); *Pacifica*, 438 U.S. 726; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

145. *Id.* at 865 (citing *Ginsberg*, 390 U.S. 629), 870–74 (citing *Miller v. California*, 413 U.S. 15 (1973)).

146. *Id.* at 874–80; *see also id.* at 875 (quoting *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (quoting *Sable*, 492 U.S. at 128)) (internal quotation marks omitted).

147. *Reno*, 521 U.S. at 864.

148. *Id.* at 865, 878 (positing that a parent “could face a lengthy prison term” for exercising “parental judgment”).

149. *Id.* at 865, 877.

to those under age eighteen.¹⁵⁰ The Court distinguished the radio indecency regulation in *Pacifica* because *Pacifica* involved a historically regulated medium, a regulatory process rather than a risk of criminal prosecution, and a time restriction rather than a ban.¹⁵¹ In distinguishing the adult theater regulations of *Renton* and its progeny, the Court rejected a zoning analogy, observing that the CDA applied to the entire Internet and focused on speech content and impact rather than merely on “‘secondary effects’—such as crime and deteriorating property values.”¹⁵²

On the second point, with respect to overbreadth, the CDA failed to define “indecent” and “patently offensive” sufficiently narrowly.¹⁵³ If the CDA meant to restrict the communication of content harmful to minors, it diverged from the statute in *Ginsberg* by failing to exempt content with “redeeming social importance for minors.”¹⁵⁴ And even reading the CDA to curtail only obscenity as to adults, per the *Miller* test, the statute failed to exempt content with “serious literary, artistic, political, or scientific value,”¹⁵⁵ and failed to require that restricted content consist of “sexual conduct specifically defined by the applicable state law.”¹⁵⁶

The Court further rejected Congress’s attempt to create in the CDA a nationwide “community standard” for obscenity, affirming the *Miller* notion that local juries play an indispensable role in defining it¹⁵⁷ (or at least “know[ing] it when [they] see it”¹⁵⁸). The first part of the Court’s three-part *Miller* test to define obscenity requires that “‘the average person, applying contemporary community standards,’ would find that the work, taken as a whole, appeals to the prurient interest.”¹⁵⁹ Jurors are

150. *Id.* at 865–66.

151. *Id.* at 866–67.

152. *Id.* at 867–68.

153. *E.g., id.* at 871 (“Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequence of prison rape would not violate the CDA?”).

154. *Id.* at 865 (quoting *Ginsberg*, 390 U.S. at 646) (internal quotation marks omitted).

155. *Id.* at 865 (adopting language from *Miller v. California*, 413 U.S. 15, 24 (1973)).

156. *Id.* at 872–73 (quoting *Miller*, 413 U.S. at 24) (internal quotation marks omitted).

157. *Id.* 873–74 & n.39.

158. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring).

159. *Miller*, 413 U.S. at 24 (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)). The *Miller* test also requires that “the work depict[] or describe[], in a patently offensive way, sexual conduct specifically defined by applicable state law; and [that] the work, taken as a whole, lack[] serious literary, artistic, political, or scientific value.” *Id.*

expected to bring to the courtroom the standards of their localities.¹⁶⁰ The Court observed that “the ‘community standards’ criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message,”¹⁶¹ an impermissible “least common denominator” approach.

On the third point, with respect to overbreadth, the Court determined that no technology existed by which an Internet speaker using a protocol such as e-mail, newsgroups, or chat could know whether children were in the audience, and no technology, such as credit-card verification or mere free password registration, could affordably and effectively aid a website owner in distinguishing adult audience members from children.¹⁶² Even were credit-card verification systems or password-protection measures affordable, some adults do not have credit cards, and mere password protections deter users.¹⁶³

Without a technology to meet the government’s precision needs, the CDA was hopelessly overbroad.¹⁶⁴ For fear of prosecution and lack of a technological solution, speakers would hold back, reducing the Internet to a “level of discourse . . . suitable for a sandbox.”¹⁶⁵ Imposition of any new technology to protect children would better come from users than from speakers, the Court suggested, quoting the district court: “[D]espite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material

160. *E.g.*, *Eckstein v. Melson*, 18 F.3d 1181, 1187 (4th Cir. 1994).

161. *Reno*, 521 U.S. at 877–78. The Court noted, but declined to discuss, the additional problems presented by “extraterritorial application of the CDA.” *Id.* at 878 n.45.

162. *Id.* at 876–77. The CDA provided that an age verification system, such as “credit card, debit account, adult access code, or adult personal identification number,” or other “good faith, reasonable, effective, and appropriate actions under the circumstances . . . which may involve any appropriate measures to restrict minors . . . including any method which is feasible under available technology,” would provide an affirmative defense to prosecution. *Id.* 860–61 & n.26. (citing 47 U.S.C.A. § 223(e)(5)).

163. *Reno*, 521 U.S. at 856–57 & n.23.

164. *Id.* at 875–77; see also *id.* at 877 (“The breadth of the CDA’s coverage is wholly unprecedented.”). See generally Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141 (agreeing with the Court’s conclusion, but criticizing the Court for employing reasoning insufficiently protective of free speech).

165. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74–75 (1983), quoted in *Reno*, 521 U.S. at 875.

which *parents* may believe is inappropriate for their children will soon be widely available.”¹⁶⁶

2. COPA and Ashcroft

In an effort to remedy the constitutional defects of the CDA,¹⁶⁷ Congress passed COPA in 1998 as part of a massive appropriations bill.¹⁶⁸ COPA provides civil and criminal sanctions for a web publisher who with “commercial purposes” knowingly makes available to persons under age seventeen material “harmful to minors.”¹⁶⁹ Thus, COPA marks significant distinctions from the CDA: COPA applies only to the World Wide Web protocol; it applies only to commercial publishers; the class of content restricted is that which is “harmful to minors”; and minors are persons under seventeen, not eighteen. A publisher with “commercial purposes” “offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person’s trade or business, with the objective of earning a profit... (although it is not necessary that the person make a profit...).”¹⁷⁰ Internet service and access providers are exempt.¹⁷¹ “[H]armful to minors” is carefully defined in a three-prong format to meet *Ginsberg* and *Miller* requirements for obscenity as to minors, or

166. *Reno*, 521 U.S. at 877 (quoting and adding emphasis to *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). See generally Lessig, *supra* note 25, at 633, 670 (reluctantly warning that, absent a “CDA-like solution,” free expression interests might suffer as a result of government “cajoling” the Internet infrastructure into “private regulation”).

167. *ACLU v. Reno*, 217 F.3d 162, 167 (3d Cir. 2000) (*Ashcroft*) (citing H.R. REP. NO. 105-775, at 12 (1998), available at 1998 WL 691067; S. REP. NO. 105-225, at 2 (1998), available at 1998 WL 413893). See generally Johanna M. Roodenburg, “Son of CDA”: *The Constitutionality of the Child Online Protection Act of 1998*, 6 COMM. L. & POL’Y 227 (2001) (analyzing constitutionality of COPA).

168. Pub. L. No. 105-277, §§ 1401–1406, 112 Stat. 2681-736 to -739 (codified at 47 U.S.C.A. §§ 230–231 (Supp. 2001)). COPA contains the Child Online Privacy Protection Act of 1998 (COPPA), which restricts the online collection of private information about children without parental consent. Pub. L. No. 105-277, §§ 1301–1308, 112 Stat. 2681-728 to -735 (codified at 15 U.S.C.A. §§ 6501–6506 (Supp. 2001)). COPPA was not a target of the ACLU suit. See generally Mark D. Robins, *Coping with COPPA: Privacy, Children, and the Internet*, COMPUTER LAW., June 2000, at 17, cited in Roodenburg, *supra* note 167, at 234 n.45.

169. 47 U.S.C.A. § 231(a), (e)(7) (Supp. 2001).

170. *Id.* § 231(e)(2)(B).

171. *Id.* § 231(b).

“variable obscenity.”¹⁷² Like the CDA, COPA provides affirmative defenses for publishers who, “in good faith,” restrict minors’ access with a verification method such as a “credit card, debit account, adult access code, or adult personal identification number; . . . a digital certificate that verifies age; or . . . any other reasonable measures that are feasible under available technology.”¹⁷³ COPA also restricts the dissemination of private information collected as part of a verification system.¹⁷⁴

The United States District Court for the Eastern District of Pennsylvania preliminarily enjoined enforcement of COPA, ruling that the ACLU and its co-plaintiffs presented a case reasonably likely to succeed on the merits, and the Third Circuit affirmed.¹⁷⁵ Both courts ruled COPA a content-based speech restriction subject to strict scrutiny, even though, as in the CDA case, there was no question that the government has a compelling interest in the protection of children.¹⁷⁶

172. *Ashcroft*, 217 F.3d at 167–68 & n.6 (citing 47 U.S.C.A. § 231(e)(6); *Miller v. California*, 413 U.S. 15, 23–25 (1973); *Ginsberg v. New York*, 390 U.S. 629, 643–45 (1968); H.R. REP. NO. 105-775, at 13). COPA defines content harmful to minors as:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C.A. § 231(e)(6).

173. 47 U.S.C.A. § 231(c)(1).

174. *Id.* § 231(d).

175. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Penn. 1999), *aff’d* 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom. Ashcroft v. ACLU*, 532 U.S. 1037 (2001) (*Ashcroft*). Plaintiffs in the COPA case were the ACLU; A Different Light Bookstores; American Booksellers Foundation for Free Expression; Artnet Worldwide Corp.; Blackstripe; Condomania; Electronic Frontier Foundation; EPIC; Free Speech Media; Internet Content Coalition; OBGYN.net; Philadelphia Gay News; Planetout Corp.; Powell’s Bookstore; Riotgrrl; Salon Internet, Inc.; and West Stock, Inc. *Ashcroft*, 217 F.3d at 162.

176. *Ashcroft*, 31 F. Supp. 2d at 492–93, 495–96; *Ashcroft*, 217 F.3d at 173. The defendant asserted in her brief that the statute may be subject to the lower level of scrutiny which has been applied to the regulation of “commercial speech”; however, the defendant did not press that position for the purposes of the temporary restraining order, nor did she argue this position at the preliminary injunction hearing. *Ashcroft*, 31 F. Supp. 2d at 493; *Ashcroft*, 217 F.3d at 179 n.22. The “commercial purposes” term in COPA is far broader than the Supreme Court’s definition of “commercial speech,” thus rendering intermediate scrutiny likely inapplicable. *See Ashcroft*, 217 F.3d at 179 n.22.

Both faulted the statute on the latter prong of strict scrutiny—narrow tailoring.¹⁷⁷ The District Court described COPA's shortcomings on several points, each focusing on the simple fact that COPA would not protect minors. For example, foreign websites, non-commercial websites, and non-web protocols would leave ample harmful material available to minors.¹⁷⁸

The court also seized on a suggestion by the plaintiffs that filters provide "at least some evidence" that COPA is not the least restrictive means to stop minors from accessing harmful material.¹⁷⁹ The court noted, though, that the plaintiffs did not argue for the congressional imposition of filtering.¹⁸⁰

While reaching the same general conclusion as to overbreadth, the Third Circuit emphasized a different point, and only one point.¹⁸¹ Crucial to the Third Circuit's analysis was COPA's "contemporary community standards" language,¹⁸² which is part of the definition of "harmful to minors" and is otherwise consistent with Supreme Court precedent since *Ginsberg* and *Miller*. While Congress in other respects accurately adapted language from case law to breathe life into its "harmful to minors" conception, a vast improvement over the vague "indecentcy" and "patently offensive" standards of the CDA, the Third Circuit decided that on the worldwide Internet, "contemporary community standards" has no functional meaning,¹⁸³ because "there is no single prevailing community standard in the United States."¹⁸⁴ The phrase "contemporary

177. *Ashcroft*, 31 F. Supp. 2d at 496–97; *Ashcroft*, 217 F.3d at 173–77.

178. *See Ashcroft*, 31 F. Supp. 2d at 496–97. As summarized by the Third Circuit, the District Court based its conclusion on the availability of harmful material from foreign websites; the possibility that minors might have their own credit cards; the breadth of COPA, applicable to all communications rather than just offensive images, the most common form of harmful content; and the availability of "parental blocking and filtering technology." *Ashcroft*, 217 F.3d at 172.

179. *Ashcroft*, 31 F. Supp. at 497.

180. *Id.* at 497 n.6.

181. *Ashcroft*, 217 F.3d at 173–74 & n.19.

182. *Id.*

183. *Id.* at 175 ("attempting to define what contemporary community standards should or could mean in a medium without geographic boundaries").

184. *Id.* at 178 (quoting *ALA v. Pataki*, 969 F. Supp. 160, 182–83 (S.D.N.Y. 1997)) (internal quotation marks omitted). The Government pointed to *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), an obscenity prosecution for electronic bulletin board content posted in one state and received in another. *Ashcroft*, 217 F.3d at 176. The court harmonized *Thomas*, observing that the Sixth Circuit in that case had rejected any national standard for obscenity where the bulletin board as a members-only forum from which readers in jurisdictions less tolerant of obscenity could have been excluded. *Id.* at 176–77.

community standards” would force “every Web communication to abide by the most restrictive community’s standards”—exactly the undesirable outcome contemplated by the *Reno* Court when it construed the CDA.¹⁸⁵ While valid precedent in other contexts, *Miller* simply “has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.”¹⁸⁶ The affirmative defense of an age verification system offered no way out for the government. Such a system “would prevent access to protected material by any adult . . . without the necessary age verification credentials [and] would completely bar access to those materials to all minors under seventeen—even if the material would not otherwise have been deemed ‘harmful’ to them in their respective geographic communities.”¹⁸⁷

While the Third Circuit purported to rely exclusively on “contemporary community standards” overbreadth grounds, it did make passing references to other of the District Court’s rationales,¹⁸⁸ including the District Court’s recognition of filtering as a less restrictive means to protect minors. The Third Circuit doubted that parental filtering could be termed a less restrictive means for government to achieve its ends,¹⁸⁹ noting that “the parental hand” is no “substitute for a congressional mandate.”¹⁹⁰ The court must have been aware of the brewing dispute over CIPA, but these notes do not reveal whether the Third Circuit would approve of a congressional mandate in lieu of a parental decision to filter.

Ashcroft is currently pending before the Supreme Court.¹⁹¹

3. CIPA and ALA/Multnomah

Having accumulated one strike on the CDA in the Supreme Court and a second strike on COPA in federal circuit court, Congress went back to the drawing board in 2000. Faced with courts troubled by efforts to silence speakers on the Internet, and by restrictions that treated adults

185. *Ashcroft*, 217 F.3d at 175–77.

186. *Id.* at 180.

187. *Id.* at 175.

188. *E.g., id.* at 177 n.21 (noting that under COPA, minors would still have access to harmful material on foreign-based and noncommercial websites).

189. *Id.* at 171 n.16.

190. *Id.* at 181 n.24.

191. *See Ashcroft v. ACLU*, (2001) (*Ashcroft*) (granting certiorari).

and children alike, Congress needed a bill that could (1) target recipients of communication rather than speakers; (2) treat adults differently from minors; and (3) offer a minimally restrictive means to identify unprotected content as to adults and minors respectively. The first two goals were easily achieved. Congress focused on Internet receivers instead of speakers by targeting the users of publicly-funded computers. And once that focus became clear, distinguishing between minors and adults followed easily. Almost all users in schools are minors, and librarians can check library cards. But what of the third problem, the minimally restrictive means? The Court,¹⁹² indeed even the ACLU,¹⁹³ had already suggested a solution: filtering.

Like COPA the year before, CIPA was part of a massive appropriations bill that passed in the last days of the 106th Congress,¹⁹⁴ and President Clinton signed the omnibus legislation despite the Administration's preference against a federal filtering mandate.¹⁹⁵ Congress passed CIPA on December 15, 2000, and the President signed the bill into law on December 21, 2000.¹⁹⁶ The final form of CIPA represents the "cobbl[ing] together" of multiple bills, but the original Children's Internet Protection Act remains the component of gravest concern.¹⁹⁷ It requires that federally funded libraries and primary and secondary schools employ "a technology protection measure," i.e.,

192. The Court in *Reno* discussed filtering as a parental tool. See *Reno v. ACLU*, 521 U.S. 844, 854-55 (1997); see also *id.* at 890-91 (O'Connor, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (suggesting that filtering forecasts the inevitable "zoning" of cyberspace).

193. *E.g.*, *Ashcroft*, 31 F. Supp. 2d at 497. At a Freedom Forum program, Ombudsman Paul McMasters asked whether CIPA was not a problem of the ACLU's own making, because in arguments over the CDA, the ACLU pointed to filtering as a less restrictive alternative. April Davis, *Experts Divided on Internet Filtering Legislation*, FREEDOMFORUM.ORG (Feb. 21, 2001), at <http://www.freedomforum.org/templates/document.asp?documentID=13157> (last visited Apr. 30, 2002); see Lessig, *supra* note 25, at 632 n.15. ACLU attorney Chris Hansen responded by distinguishing the parental choice to filter, of which the ACLU approves, from the government mandate. Audio tape: Forum on CIPA, held by the First Amendment Center (Feb. 20, 2001) (on file with author).

194. See *supra* note 23.

195. See Hopper, *supra* note 129.

196. See *supra* notes 4, 23.

197. See THOMAS M. SUSMAN, ROPES & GRAY, CHILDREN'S INTERNET PROTECTION: MORE QUESTIONS THAN ANSWERS 1 (Jan. 13, 2001) (handout at 2000-01 mid-winter meeting of the ALA) (on file with author). CIPA constitutes Title XVII of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 2001. *Id.* The original Children's Internet Protection Act 1701 to 1721, and the Neighborhood Children's Internet Protection Act 1731 to 1733 (regarding safety policies). *Id.* See generally Horowitz, *supra* note 94 (analyzing constitutionality of CIPA).

filtering,¹⁹⁸ on any computer with Internet access to prevent computer users from accessing obscenity or child pornography.¹⁹⁹ Additionally, when a minor is using a computer, the library or school must employ filtering to block the minors' access to material "harmful to minors."²⁰⁰

Unlike COPA, CIPA contains no limitations on the Internet communications to which it applies, whether by protocol or commercial nature. CIPA applies to schools and libraries²⁰¹ funded under the Elementary and Secondary Education Act of 1965 (ESEA),²⁰² the Museum and Library Services Act of 1996 (MLSA)²⁰³ (namely its included Library Services and Technology Act of 1996 (LSTA)²⁰⁴), and most importantly, schools and libraries benefiting from the "universal service discounts," or "e-rate funds," under the Communications Act of 1934,²⁰⁵ as subsequently amended by the Telecommunications Act of 1996.²⁰⁶ The text of CIPA is challenging to comprehend because it aims to amend each of the statutory bases for these funding sources. Much of the definitional language is repeated verbatim, but there are some differences. "[H]armful to minors" is defined four times, but uniformly.²⁰⁷ The definition again tracks the *Ginsberg-Miller* variable

198. "[T]echnology protection measure" is defined as "specific technology that blocks or filters Internet access." CIPA, U.S.C. §§ 1703(b)(1), 1721(b).

199. CIPA, U.S.C. §§ 1711 (amending Title III of the Elementary and Secondary Education Act of 1965, 20 U.S.C.A. §§ 6801-7100) (public schools), 1712 (amending the Museum and Library Services Act, 20 U.S.C § 9134(b)) (public libraries), 1721 (amending Communications Act of 1934, 47 U.S.C.A. § 254(h)) (filtering, both schools and libraries), 1732 (amending Communications Act of 1934, 47 U.S.C.A. § 254) (safety policies, both schools and libraries).

200. *Id.*

201. CIPA §§ 1711, 1712(a), 1721. Of federal funds, only money granted under ESEA and LSTA may be used to purchase filtering technology. CIPA § 1721(g).

202. 20 U.S.C.A. §§ 6301-8962 (2000 & Supp. 2001).

203. *Id.* §§ 9101-9176.

204. *Id.* §§ 9121-9163.

205. Communications Act of 1934, 47 U.S.C.A. §§ 151-615 (1991 & Supp. 2001).

206. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending, *inter alia*, 47 U.S.C.A. § 254).

207. CIPA §§ 1703(b)(2), 1711, 1712(a), 1721(c). The provisions state:

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that—

(A) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(B) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

obscenity standard, though now describing only visual depictions and with the "contemporary community standards" safeguard absent.²⁰⁸ Minors are again defined as persons under age seventeen.²⁰⁹ The ESEA and MLSA/LSTA provisions have peculiar "disabling" provisions that state a school or library authority "may disable [a] technology protection measure . . . to enable access for bona fide research or other lawful purposes."²¹⁰ The e-rate restrictions contain a similar provision, but only for disabling "during use by an adult," whether in a public school²¹¹ or in a general public library.²¹² CIPA further requires that schools and libraries adopt "Internet safety polic[ies]" regarding minors' Internet access.²¹³

To continue receiving federal money, libraries and schools must certify their compliance with CIPA.²¹⁴ Though the various federal funds at stake are coordinated by different agencies, the Federal Communications Commission (FCC), which manages e-rate funding, has assumed the lead role in developing a certification procedure.²¹⁵ The other responsible agencies, the Department of Education and the Institute of Museum and Library Services (IMLS), will develop guidance following the FCC's lead.²¹⁶

Id.

208. *See id.* The Neighborhood Internet Children's Protection Act part of CIPA, requiring local "safety polic[ies]" to protect minors, states that local library authorities may determine what is "inappropriate for minors." *Id.* § 1732 (adding 47 U.S.C. § 254(f)). CIPA itself defines "obscenity," "child pornography," "sexual act," and "sexual content" with reference to federal law. *Id.* §§ 1703(b)(2), 1711, 1712(a), 1721(c).

209. *Id.* §§ 1711, 1712(a), 1721(c).

210. *Id.* §§ 1711-1712.

211. *Id.* § 1721(a).

212. *Id.* § 1721(b).

213. *Id.* § 1732.

214. *Id.* § 1721(a)-(b).

215. *See* THOMAS M. SUSMAN, ROPES & GRAY, QUESTIONS AND ANSWERS ON CHILDREN'S INTERNET PROTECTION LEGISLATION 2 (Jan. 13, 2001) (handout at 2000-01 mid-winter meeting of the ALA) (on file with author).

216. *Id.* On April 5, 2001, the FCC released its CIPA compliance rules, effective April 20, 2001, at least with respect to e-rate funding. *In re* Fed.-State Joint Bd. on Universal Serv.: CIPA, CC Dkt. No. 96-45, FCC No. 01-120 (adopted Mar. 30, 2001), *available at* 2001 WL 327640. The "Funding Year" for the e-rate programs runs from July 1 to June 30, not to be confused with the "Fiscal Year," which begins October 1 annually. *E.g.*, THOMAS M. SUSMAN, ROPES & GRAY, CHILDREN'S INTERNET PROTECTION TIMELINE 2, 8 (Jan. 13, 2001) (handout at 2000-01 mid-winter meeting of the ALA) (on file with author). "Year 4" began July 1, 2001, and "Year 5" will begin July 1, 2002. *Id.* at 8. For Year 4, the FCC requires schools and libraries to certify on FCC Form 486 that (1) they are in compliance with CIPA for Year 4; (2) they are taking action, "including any necessary

The FCC declined to further embellish its rules in response to public comments, whether for or against filtering. The commission wrote that it would defer to Congress as to the constitutionality of CIPA.²¹⁷ The commission refused to make rules governing CIPA's disabling provisions,²¹⁸ but observed that the disabling provisions could accommodate staff use of nonpublic computers, which are not exempt from CIPA.²¹⁹ The FCC also refused to require schools and libraries to post Internet policies and complaint procedures;²²⁰ to require them to catalog filter failures or patron complaints;²²¹ or to require them to certify that their filtering mechanisms and safety policies are effective.²²² In response to comments that no filter exists that is not both over- and under-inclusive of CIPA's objectives, and that certification of CIPA compliance might therefore be dishonest,²²³ the FCC expressed confidence that a "good faith effort . . . in a reasonable manner" would satisfy congressional intent.²²⁴ The FCC set out to implement CIPA without burdening schools and libraries more than necessary,²²⁵ and the rules do evince a strict construction of the statute.

The ALA Board voted on January 17, 2001, to challenge CIPA and, along with co-plaintiffs, filed a complaint in the Eastern District of Pennsylvania on March 20, 2001.²²⁶ The ACLU organized a collection of

procurement procedures, to comply with" CIPA for Year 5; or (3) CIPA does not apply because e-rate funds are used for telecommunications but not computing services. *Id.* at 17. Presumably the FCC will drop the second certification option this year, for Year 5 funding. *See id.* at 9. That means subject schools and libraries must have filters in place, at latest, on July 1, 2002. *Id.*

217. *In re Fed.-State Joint Bd.*, *supra* note 216, at 7, para. 9.

218. *Id.* at 23–24, para. 53.

219. *Id.* at 15, para. 30. The commission also observed that the disabling provisions could accommodate what commentators pointed to as a conflict between CIPA and the federal law of government depository libraries, which "free and open access to all citizens . . . regardless of age." *Id.* at 15–16, para. 31.

220. *Id.* at 18, paras. 40–41.

221. *Id.* at 18–19, para. 42.

222. *Id.* at 16, para. 33.

223. *Id.* at 16–17, para. 34.

224. *Id.* at 17, para. 35.

225. *See id.* at 3, para. 2.

226. ALA, Resolution on Opposition to Federally Mandated Internet Filtering (Jan. 17, 2001), available at <http://www.ala.org/alaorg/oif/mandatedfiltering.html> (last visited Apr. 30, 2002); ALA, CIPA Litigation, at <http://www.ala.org/cipa/litigation.html> (last visited Apr. 30, 2002). Plaintiffs are the ALA; the Freedom to Read Foundation; the Alaska, California, New England, and New York library associations; the Association of Community Organizations for Reform Now; Friends of the Philadelphia City Institute Library; the Pennsylvania Alliance for Democracy (PAD); parent, library patron, and PAD Executive Director Elizabeth Hrenda; and Philadelphia Community College English Professor C. Donald Weinberg. ALA Compl., *supra* note 11, paras. 13–26. Defendants are

libraries, patrons, and website proprietors that also filed suit on March 20, 2001.²²⁷ CIPA calls for the case to go to a three-judge district panel, with any appeal directly to the Supreme Court.²²⁸ Both groups of plaintiffs challenge only the IMLS and e-rate filtering-for-funding parts of CIPA applicable to general public libraries,²²⁹ not the ESEA and e-rate restrictions applicable to public schools and not the requirements for Internet safety policies.

Seeking a declaratory judgment and an injunction,²³⁰ the ALA plaintiffs make their case in six counts. Counts 1 and 2 allege facial violation of the First Amendment free speech and Fifth Amendment due process "because [CIPA] conditions access to funding and discounts on acceptance of content and viewpoint restrictions on otherwise available, constitutionally protected speech on the Internet."²³¹ This count, which refers to both e-rate discounts and LSTA grants, claims that libraries are limited public forums, and that strict scrutiny applies because CIPA is a content- and viewpoint-based regulation. CIPA fails strict scrutiny because it is not the least restrictive means at Congress's disposal.²³² Count 3 alleges unconstitutional prior restraint in filters' blocking of

the United States, FCC Chairman Michael Powell, the FCC, IMLS Acting Director Beverly Sheppard, and IMLS. *Id.*

227. Plaintiffs include libraries and library associations from California, Connecticut, Maine, New York, Oregon, and Wisconsin; patrons, including minors, and including a lesbian teen; and website proprietors, including two politicians and organizations providing information about safe sex, homosexuality, and nudism. Multnomah Compl., *supra* note 11, paras. 13–19, 21–37, 199. One of the complaining politicians is Jeffrey Pollock. *See supra* note 47 and accompanying text. Defendants are the United States, the FCC, and IMLS. Multnomah Compl., *supra* note 11, paras. 39–41.

228. CIPA § 1741, 114 Stat. 2763A-351 to -352 (2001).

229. Multnomah Compl., *supra* note 11, paras. 42–62; *see also* ALA Compl., *supra* note 11, para. 4.

230. ALA Compl., *supra* note 11, paras. A–B.

231. *Id.* para. 128.

232. *See id.* para. 129. Both sets of plaintiffs also assert that CIPA imposes "unconstitutional conditions," *id.*; Multnomah Compl., *supra* note 11, para. 254, hopeful the Court might employ the unconstitutional conditions doctrine. That doctrine states: "Government cannot accomplish indirectly—through conditioning the allocation of benefits such as . . . tax subsidies—that which it is barred from doing directly." Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 460 (1995). Of course, the unconstitutional conditions doctrine depends on rejection of its evil twin, the right-privilege doctrine, RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 10.01[3][a], at 10-11 to -13 (1994), especially in its modern manifestation as the government-as-speaker doctrine.

otherwise available, constitutionally protected Internet speech.²³³ Count 4 alleges a chilling effect in that patrons are unlikely to exercise their right to receive constitutionally protected Internet speech if doing so requires asking librarians in advance to disable filters.²³⁴ And counts 5 and 6 allege First/Fifth Amendment vagueness in the disabling provisions and generally in CIPA's e-rate and IMLS provisions.²³⁵

Also seeking declaratory judgment and injunction,²³⁶ the *Multnomah* plaintiffs assert an unspecified number of causes of action in nine substantive paragraphs. They assert: (1) censorship of constitutionally protected speech; (2) prior restraint; (3) unconstitutional conditions on government funding; (4) over-inclusive blocking; (5) content and viewpoint discrimination failing strict scrutiny; (6) under-inclusive blocking; (7) arbitrariness in the disabling provisions; (8) a chilling effect in the disabling provisions; and (9) First and Fifth Amendment vagueness in CIPA generally.²³⁷

The complaints' factual and legal allegations attack all of filters' vulnerabilities: secret criteria imposed outside judicial processes,²³⁸ content- and viewpoint-discrimination,²³⁹ inability to scan images,²⁴⁰ impossibility of automating flexible legal definitions,²⁴¹ erroneous over-inclusiveness,²⁴² and erroneous under-inclusiveness.²⁴³ The complaints further attack CIPA's lack of a "contemporary community standards" criterion;²⁴⁴ CIPA's lack of a parental opt-out;²⁴⁵ the vagueness, potential

233. ALA Compl., *supra* note 11, para. 138.

234. *Id.* para. 140.

235. *Id.* paras. 142, 144.

236. Multnomah Compl., *supra* note 11, paras. A–B.

237. *Id.* paras. 252–60.

238. ALA Compl., *supra* note 11, paras. 5, 33, 35, 112; Multnomah Compl., *supra* note 11, paras. 3, 7, 97.

239. ALA Compl., *supra* note 11, paras. 5, 34, 44, 107; Multnomah Compl., *supra* note 11, paras. 3, 88, 256.

240. ALA Compl., *supra* note 11, para. 40, 115; Multnomah Compl., *supra* note 11, paras. 92, 99, 116.

241. ALA Compl., *supra* note 11, paras. 5, 43, 76, 78, 110–11, 113; Multnomah Compl., *supra* note 11, paras. 3, 86, 89, 125.

242. ALA Compl., *supra* note 11, paras. 5, 36, 38, 44–45, 75–76, 114, 116–17; Multnomah Compl., *supra* note 11, paras. 3, 84, 104–10, 117, 122, 255.

243. ALA Compl., *supra* note 11, para. 42; Multnomah Compl., *supra* note 11, paras. 4, 85, 111, 257.

244. Multnomah Compl., *supra* note 11, para. 64.

245. ALA Compl., *supra* note 11, para. 86, 123.

chilling effect, and administrative burden of the disabling provisions;²⁴⁶ the “digital divide” problem created by filtering public computers on which low-income persons and rural residents depend;²⁴⁷ and the breadth of application to all computers in a federally funded facility regardless of whether federal money bought those computers.²⁴⁸

The plaintiffs’ allegations include an interesting assortment of data:

- The Internet contains more than 1.5 billion web pages;²⁴⁹ more than 400 million people use the Internet.²⁵⁰
- Less than two percent of web pages contain sexually explicit content.²⁵¹
- “At least one member of almost forty-five percent of all U.S. households visited a public library within the last month. Among households with children under the age of eighteen, nearly sixty-one percent visited a library within the last month.”²⁵²
- U.S. reference librarians answer more than seven million questions weekly.²⁵³
- Ninety-five percent of public libraries offer public Internet access.²⁵⁴ Ninety-five percent of those libraries with public Internet access have acceptable use policies (AUPs).²⁵⁵

246. ALA Compl., *supra* note 11, paras. 7, 60, 87–89, 93, 108, 120–22; Multnomah Compl., *supra* note 11, paras. 5, 45, 129–30, 183, 258–59. The *Multnomah* plaintiffs suggest that the absence of a disabling provision as to minors forecloses even application of a library’s challenge procedure, cutting minors off from constitutionally protected content blocked erroneously. *See Multnomah Compl.*, *supra* note 15, para. 185.

247. ALA Compl., *supra* note 11, paras. 55, 62–63, 68–72, 106; Multnomah Compl., *supra* note 11, paras. 2, 48, 52, 79–81, 124, 181.

248. ALA Compl., *supra* note 11, paras. 6, 95–96, 99–101, 118–19; Multnomah Compl., *supra* note 11, paras. 62–63, 123.

249. Multnomah Compl., *supra* note 11, para. 112. Or at least one billion “with several million new websites created each day.” ALA Compl., *supra* note 11, para. 28.

250. ALA Compl., *supra* note 11, para. 29; Multnomah Compl., *supra* note 11, ¶ 65.

251. ALA Compl., *supra* note 11, para. 30.

252. Multnomah Compl., *supra* note 11, para. 73.

253. *Id.* para. 74.

254. ALA Compl., *supra* note 11, para. 53 (citing Bertot & McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables*, in REPORT TO NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE 3 (Sept. 7, 2000)); Multnomah Compl., *supra* note 11, para. 76.

- Less than seventeen percent of those libraries with public Internet access use filters in some capacity.²⁵⁶ Less than seven percent of those libraries with public Internet access use filters on all computer terminals.²⁵⁷
- “[M]ost [filters] fail[] to block one objectionable site in five,” according to a *Consumer Reports* study.²⁵⁸ All filters tested blocked no better than four objectionable sites in five.²⁵⁹ “Some blocking programs blocked as many as one in five [legitimate] sites.”²⁶⁰
- About 49% of public libraries receive e-rate discounts,²⁶¹ which have summed more than \$190 million “since the program’s inception,”²⁶² and “70% of libraries serving communities with poverty levels in excess of 40% receive e-rate discounts.”²⁶³
- LSTA-authorized funding totaled \$166.2 million in the 1999 fiscal year.²⁶⁴

Finally, the *ALA* plaintiffs suggest less restrictive alternatives to filtering, including: library educational programs; “clear, specific” AUP standards and instructions regarding illegal content; content-neutral restrictions such as time and printing limits; informal appellate mechanisms; training, tutorials, and site lists developed for children; privacy screens and screensavers; and anti-disruption policies.²⁶⁵

The *ALA* and *Multnomah* cases are currently in pretrial motions in federal district court.²⁶⁶

255. *ALA Compl.*, *supra* note 11, para. 56 (citing LIBR. RES. CTR., GSLIS, UNIV. OF ILL., SURVEY OF INTERNET ACCESS MANAGEMENT IN PUBLIC LIBRARIES 7–8 (2000), at <http://www.lis.uiuc.edu/gslis/research/internet.pdf> (last visited Apr. 30, 2002)).

256. *Id.*

257. *Id.*

258. *Id.* para. 42 (quoting *Digital Chaperones for Kids*, *supra* note 44, at 22).

259. *Multnomah Compl.*, *supra* note 11, para. 121 (citing *Digital Chaperones for Kids*, *supra* note 44).

260. *Id.*

261. *ALA Compl.*, *supra* note 11, para. 69 (citing Bertot & McClure, *supra* note 254, at 4).

262. *Id.* para. 68.

263. *Id.* para. 69 (citing Bertot & McClure, *supra* note 254, at 4).

264. *Multnomah Compl.*, *supra* note 11, para. 61.

265. *ALA Compl.*, *supra* note 11, para. 125.

266. *ALA*, IMPORTANT CIPA DATES, at <http://www.ala.org/cipa/importantcipadates.html> (last visited Apr. 30, 2002); see Press Release, ACLU, ACLU Responds to Confusion Over Library

4. *State Law*

State legislatures have worked themselves into a frenzy of efforts to restrict Internet expression and access to that expression,²⁶⁷ even while federal Internet regulation struggles in the courts, and even after the courts enjoined three state statutes—in New York, New Mexico, and Michigan—modeled on the CDA and COPA. For example, laws in Oklahoma, Connecticut, and Georgia currently prohibit various online communications. Oklahoma prohibits expression “harmful to minors,” when expressed to minors.²⁶⁸ Connecticut prohibits “harass[ing], annoy[ing,] or alarm[ing]” communications to any person.²⁶⁹ And in Georgia, “vulgar” expression is not allowed to minors under fourteen.²⁷⁰

Recent, third-generation state statutes are modeled on CIPA, aiming to protect minors through the mandatory imposition of filtering in public schools and libraries, sometimes as a condition of public funding.²⁷¹ By the end of 2001, ten states had legislated filtering to some extent.²⁷² At least eleven other state legislatures had filtering bills on the table.²⁷³ These statutes and bills do not account for the untold number of localities that have imposed filtering by ordinance or regulation,²⁷⁴

Blocking Software Law; Seeks December Trial Date in Legal Challenge (May 17, 2001), at <http://www.aclu.org/news/2001/n051701a.html> (last visited Apr. 30, 2002).

267. See ACLU, ONLINE CENSORSHIP IN THE STATES, at <http://www.aclu.org/issues/cyber/censor/stbills.html> (last visited Apr. 30, 2002) (citing various bills pending in 1998 and statutes then in force); see also Barbara H. Smith, *To Filter or Not To Filter: The Role of the Public Library in Determining Internet Access*, 5 COMM. L. & POL’Y 385, 413 (2000) (“Between 1995 and 1999, at least twenty-five states considered or passed legislation affecting Internet content . . .”).

268. OKLA. STAT. tit. 21, § 1040.76 (Supp. 2001).

269. CONN. GEN. STAT. § 53a-183 (Supp. 2001).

270. GA. CODE ANN. § 16-11-39 (1999).

271. See Semitsu, *supra* note 16, at 524–25.

272. See Table accompanying notes 277–78, *infra*.

273. See 2001 Haw. H.B. 126; 2001 Haw. S.B. 142; 2001 Haw. S.B. 808; 2001 Ill. H.B. 806; 2001 Ind. H.B. 1793; 2001 Miss. H.B. 393; 2001 Mo. H.B. 393; 2001 Mo. H.B. 407; 2001 Mo. S.B. 42; 2001 Mo. S.B. 214; 2000 N.J. A.B. 2196; 2001 N.Y. A.B. 4147; 2001 N.Y. A.B. 4188; 2001 N.C. H.B. 478; 2001 N.C. S.B. 599; 2001 N.C. S.B. 1032; 2001 Ohio H.B. 94; 2001 Pa. H.B. 10; 2001 Pa. H.B. 583; 2001 Tex. H.B. 2713; 2001 Tex. H.B. 2824; 2001 Tex. S.B. 1310; see also 2001 Ill. H. Res. 359; 2001 Ill. S. Res. 157.

274. E.g., Rolando José Santiago, Comment, *Internet Access in Public Libraries: A First Amendment Perspective*, 32 URB. LAW. 259, 259–60 (2000) (citing Jessica Kowal & Matthew McAllester, *Stopping Smut on the Web: For Schools, Libraries, It's Decency vs. Liberty*, NEWSDAY, Apr. 5, 1998, at A07); Wayne Risher, *Porn Blocking Software Works at Library*, [MEMPHIS] COM. APPEAL, Jan. 6, 2000, at B3, available at 2000 WL 4435156.

sometimes pursuant to statutes that merely require AUPs,²⁷⁵ or federal and state public agencies that have imposed filtering of their own volition.²⁷⁶

Table
FILTERS IN PUBLIC LIBRARIES ("PL")
AND PUBLIC SCHOOLS ("PS") BY STATE STATUTE (2001)²⁷⁷

State	PL/PS	Broadest Content Restriction	Users Affected	Notes
Ariz.	PL	harmful/illegal to minors	minors	a
	PS	harmful/illegal to minors	unspecified	
Ark.	PS	harmful/illegal to minors	unspecified	
Colo.	PL	harmful/illegal to minors	minors	a, b
	PS	harmful/illegal to minors	minors	a, b
Ky.	PS	sexually explicit	students	
La.	PS	hostile or dangerous school environment, pervasively vulgar, excessively violent, or sexually harassing	students and employees	c
Minn.	PL	harmful/illegal to minors	minors <17	d
		illegal	all	b, d
	PS	harmful/illegal to minors	students	d
		illegal	all	b, d
S.C. ²⁷⁸	PL	harmful/illegal to minors	minors	e
		hardcore pornography	all	e, f
Va.	PS	harmful/illegal to minors	students	a
		illegal	students and employees	a

a. Statute is permissive, or AUP without filtering may be acceptable.

b. Restriction is tied to public funding.

c. "[L]egitimate scientific or educational purpose" excepted upon approval. Daily newspapers of 1000+ circulation are excepted for students.

d. "[O]ther effective methods" permitted, but statute aims for filtering.

e. Limited pilot program.

f. "Literary, artistic, political, or scientific purpose" excepted for adults upon request.

275. E.g., IND. CODE § 20-14-1-7 (2001).

276. E.g., *Greenville, South Carolina Public Library To Filter Most Computers*, LIBR. J. DIGITAL NEWS, July 24, 2000; David Moon, *Filter Tiff*, UNIV. BUS., Apr. 1999, at 60 (describing frustration with SurfWatch at the Boalt Hall Law School Library, University of California-Berkeley); George I. Seffers, *Army Casts Internet Filters*, FED. COMPUTER WEEK, Apr. 23, 2001 (describing \$1.8 million contract award to WebSense Enterprises to filter access for more than 500,000 Army employees in the United States, Europe, and the Pacific Rim).

277. ARIZ. REV. STAT. § 34-502 (Supp. 2000); 2001 Ark. H.B. 1003 (codified at ARK. CODE ANN. §§ 6-21-111, 13-2-104(a) (Michie Supp. 2001)); COLO. REV. STAT. § 24-90-404(d) (2000); CONN. GEN. STAT. § 10-262n (Supp. 2001); KY. REV. STAT. ANN. § 156.675 (Michie Supp. 2001); LA. REV. STAT. ANN. § 17:100.7 (West 2001); MINN. STAT. §§ 125B.15, 134.50 (Supp. 2001); S.C. CODE ANN. § 10-1-206 (Law. Co-op. Supp. 2000); VA. CODE ANN. § 22.1-70.2 (Michie Supp. 2001).

278. See *South Carolina Attorney General Pushes Filters, Promises Defense*, LIBR. J. DIGITAL NEWS, July 24, 2000.

The Arkansas experience is illustrative. A law passed in spring 2001 requires, pursuant to pending state regulations, that public schools employ filters to protect minors against harmful material, defined per *Ginsberg* and *Miller*, and that public schools and public libraries both develop AUPs to protect minors.²⁷⁹ The bill initially required filtering in both public schools and libraries, for minors and adults.²⁸⁰ An Arkansas House Committee passed that version unanimously despite testimony from this author that it would be unconstitutional if enacted.²⁸¹ In response to vociferous opposition from the Arkansas Library Association (ArLA), the Arkansas ACLU, and librarians in the state, the Arkansas Senate Technology Committee amended the bill so that public libraries came under the AUP, but not the filtering, provision. Much to the chagrin of the Senate committee, the same coalition still objected. ArLA represents school libraries, too, and school librarians came out in force against the bill. When this author asserted to one senator, who is an attorney, that the bill raised constitutional problems, he responded that the constitutional problems had been remedied by limiting the bill's application to schools.²⁸² When I suggested that minors also have constitutional rights at stake, he answered, "Then we should amend the Constitution." In all, besides the bill's sponsor, only one person, a parent, testified in favor of mandatory filtering. The final bill passed despite overwhelming opposition in committee hearings from parents, librarians, educators, and lawyers.

The courts have thrice enjoined Internet-restrictive state statutes. Most recently in *American Library Ass'n v. Pataki*,²⁸³ with the Supreme Court's decision in *Reno* pending, the United States District Court for the Southern District of New York granted a preliminary injunction to an ACLU coalition challenging a New York law that legislators "designed

279. 2001 Ark. H.B. 1003 (Apr. 12, 2001) (codified at ARK. CODE ANN. §§ 6-21-111, 13-2-104(a) (Michie Supp. 2001)).

280. 2001 Ark. H.B. 1003 (Jan. 8, 2001) (codified as amended at ARK. CODE ANN. §§ 6-21-111, 13-2-104(a) (Michie Supp. 2001)).

281. This author testified against the bill multiple times in Arkansas's 2001 legislative session. I personally witnessed the incidents recounted here.

282. Author's Conversation with Senator John E. Brown at the Arkansas Capitol (Feb. 19, 2001). School librarians asserted that filtering will unconstitutionally restrict their Internet use, as well as the Internet use of teachers and minors, but the committee never addressed that problem.

283. 969 F. Supp. 160 (S.D.N.Y. 1997)

to avoid the constitutional pitfalls presented by the CDA.”²⁸⁴ The New York law criminalized online communication to minors of “nudity, sexual conduct or sado-masochistic abuse . . . which is harmful to minors,” further defining “harmful to minors” similarly to COPA.²⁸⁵ The court ruled that the statute was a per se violation of the Commerce Clause because of interference with interstate communication and commerce.²⁸⁶ A California art dealer, for example, would risk prosecution in New York for displaying art online to a prospective buyer in Oregon.²⁸⁷ Though declining to examine the First Amendment issues in the case,²⁸⁸ the court rejected New York State’s contention that “only a small percentage of Internet communications are ‘harmful to minors’ and would fall within the proscriptions of the statute.”²⁸⁹

I note that in the past, various communities within the United States have found works including *I Know Why the Caged Bird Sings* by Maya Angelou, *Funhouse* by Dean Koontz, *The Adventures of Huckleberry Finn* by Mark Twain, and *The Color Purple* by Alice Walker to be indecent. . . . I point out that a famous painting by Manet which shows a nude woman having lunch with two fully clothed men was the subject of considerable protest when it first was unveiled in Paris, as many observers believed that it was “scandalous.”²⁹⁰

Though ruling on interstate commerce grounds, the court observed that even communities within New York cannot agree on obscenity, noting that hardcore pornographic films such as *Deep Throat* have been ruled non-obscene in New York City.²⁹¹

In *ACLU v. Johnson*²⁹² and *Cyberspace Communications, Inc. v. Engler*,²⁹³ the United States District Courts for the District of New

284. *Id.* at 183 (analyzing N.Y. PENAL LAW § 235.21(3) (2000)).

285. *Id.* at 163 (analyzing N.Y. PENAL LAW § 235.15–.24 (2000)).

286. *Id.* at 168–69.

287. *Id.* at 174.

288. *Id.* at 183.

289. *Id.* at 180.

290. *Id.*

291. *Id.* at 183 n.10 (citing *United States v. Various Articles of Obscene Merch.* Schedule No. 2102, 709 F.2d 132, 134, 137 (2d Cir. 1983)).

292. *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *issuing prelim. inj. after den. mots. to dismiss*, 4 F. Supp. 2d 1024 (D.N.M. 1998) (*Johnson I*), and *inj. aff’d*, *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (*Johnson II*).

Mexico and the Eastern District of Michigan both granted injunctions to ACLU coalitions challenging state laws in the post-CDA generation. The Tenth Circuit, in 1999, affirmed the preliminary injunction in New Mexico.²⁹⁴ The Sixth Circuit, in 2000, affirmed the preliminary injunction in Michigan,²⁹⁵ and the court in Michigan in 2001 made that injunction permanent.²⁹⁶ The New Mexico law would have prohibited the online transmission to minors of depictions of "nudity, sexual intercourse or any other sexual conduct."²⁹⁷ The narrower Michigan law would have prohibited Internet speakers from communicating content "harmful to minors" online.²⁹⁸ Not surprisingly, in light of *Reno* each court ruled that the statute under its consideration was likely overbroad,²⁹⁹ or likely to fail strict scrutiny.³⁰⁰ And not surprisingly in light of *Pataki*, each court ruled that the statute under its consideration violated the Commerce Clause.³⁰¹

Like the Court in *Reno*, the district court in *Cyberspace Communications* pointed to filtering, specifically parental filtering, as a less restrictive means of serving the compelling government interest, having taken testimony on the subject.³⁰² Indeed, in a section entitled "Fundamental Right of Child Rearing," the court went even further in dicta, explicating a "good argument" that "Plaintiffs did not raise."³⁰³ The court described the "duty[] of every parent to teach and mold

293. *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (*Cyberspace Communications I*), *prelim. inj. aff'd*, , *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (*Cyberspace Communications II*), *on remand, granting mot. summ. j.*, *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (*Cyberspace Communications III*).

294. *Johnson II*, 194 F.3d at 1164.

295. *Cyberspace Communications II*, 238 F.3d 420.

296. *Cyberspace Communications III*, 142 F. Supp. 2d at 831.

297. N.M. STAT. ANN. § 30-37-3.2(A) (Michie Supp. 2001).

298. MICH. COMP. LAWS ANN. §§ 722.671-.682 (West 1993 & Supp. 2001).

299. *Johnson II*, 194 F.3d at 1162 n.10; *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1033 (D.N.M. 1998) (*Johnson I*); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 753 (E.D. Mich. 1999) (*Cyberspace Communications I*).

300. *Johnson II*, 194 F.3d at 1158-60; *Cyberspace Communications III*, 142 F. Supp. 2d at 830.

301. *Johnson II*, 194 F.3d at 1160-63 (repeatedly citing *Am. Library Assoc. v. Pataki*, 969 F. Supp. 160, 168-83 (S.D.N.Y. 1997)); *Johnson I*, 4 F. Supp. 2d at 1033-34 (citing *Pataki*, 969 F. Supp. at 177-80); *see also Cyberspace Communications III*, 142 F. Supp. 2d at 830-31 (citing *Pataki*, 969 F. Supp. at 175); *Cyberspace Communications I*, 55 F. Supp. 2d at 751-52 (citing *Pataki*, 969 F. Supp. at 175, 177).

302. *Cyberspace Communications I*, 55 F. Supp. 2d at 752-53.

303. *Id.* at 752.

children's concepts of good and bad, right and wrong . . . in the confines of . . . [the] home."³⁰⁴ The availability of technology to limit children's Internet access constitutes "less restrictive means" that obviate the need for government restrictions at the expense of adults' rights, the court concluded.³⁰⁵ In its subsequent opinion, the court added that it "previously took judicial notice that every computer is manufactured with an on/off switch that parents may utilize, in the end, to control the information which comes into their home via the Internet."³⁰⁶ Thus, the court seemed untroubled that the "less restrictive means" to protect children were a means available to parents, not necessarily to government.

B. *Constitutional and Case Law Pertinent to Internet Filtering*

1. *Before the Internet: From the First Amendment to Pico*

Underpinning the legal debate on Internet filtering are two thinly developed but vital concepts in constitutional law: first, the First Amendment right to receive information and ideas, as apart from the right to express oneself; and second, the historically significant and almost sacrosanct role of the public library as a locus for the exercise of this right to receive.

The First Amendment, incorporated through the due process clauses of the Fifth and Fourteenth Amendments,³⁰⁷ protects the freedom of speech,³⁰⁸ which includes a guarantee of free expression in electronic media.³⁰⁹ The First Amendment also guarantees the corollary freedom to receive expression.³¹⁰ This "right to receive" operates without regard to

304. *Id.*

305. *Id.* at 752–53.

306. *Cyberspace Communications III*, 142 F. Supp. 2d at 830.

307. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

308. See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

309. *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997).

310. *E.g.*, *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976). The Supreme Court referred to the right to receive as early as 1943, in *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), cited in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). In 1969, the Court in *Stanley v. Georgia* described "the right to receive information and ideas" as "well established." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The Supreme Court again recognized the right in *Reno v. Reno*, 521 U.S. at 874.

“the social worth” of the expression.³¹¹ Rejecting a conviction for private possession of obscenity in *Stanley v. Georgia*, the Court broadly construed the right to receive—or First Amendment liberty generally—to include the freedom from state action “to control men’s minds” and “the right to be free from state inquiry into the contents of [one’s personal] library.”³¹² The right to receive exists in a First Amendment “penumbra” where it has played a role in the formulation and restatement of other constitutional rights, including the right to privacy,³¹³ the right to express and receive commercial speech,³¹⁴ and a limited right of access to government.³¹⁵

Functionally, the right to receive does not stand apart from the freedom of expression; both trigger the same analyses and thus are considered at once when both rights are at stake. The *Reno* Court discussed simultaneously the impact of Internet regulation on the rights to express and receive,³¹⁶ understanding that the twin rights are inextricable.³¹⁷

The right to receive is critically important in the public library. “Libraries are the archetypal traditional government-funded loci for acquiring knowledge, just as streets and parks are by tradition the archetypal government-funded loci for speaking.”³¹⁸ As such, libraries

311. *Stanley*, 394 U.S. at 564 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

312. *Id.* at 565.

313. *See Griswold*, 381 U.S. at 482–83.

314. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756–57 (1976).

315. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)) (identifying a right of access to the courtroom); *see also Pell v. Procunier*, 417 U.S. 817, 832 (1974) (recognizing right to receive but refusing to find a right of access to prison inmates).

316. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

317. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386–90 (1969) (public right to hear diverse views on radio); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (public right to receive communist literature in mail); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (labor organizer’s right to speak and union members’ right to hear)), *cited in Richmond Newspapers*, 448 U.S. at 576; *see also Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974) (invalidating state restrictions on prison inmate mail, recognizing that “the interests of both parties are inextricably meshed”), *overruled on unrelated grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989).

318. Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries’ Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 221 (Mar. 2000) (footnotes omitted).

should be preserved for all manner of public inquiry.³¹⁹ In our society libraries might indeed be as important as public parks. But libraries are far more shy when it comes to appearing in case law. There are scarcely two prominent Supreme Court opinions concerning public libraries—*Brown v. Louisiana*³²⁰ and *Board of Education, Island Trees Union Free School District No. 26 v. Pico*³²¹—and their present-day rings of authority come more from persistent echoes than from enduring vitality.

Brown gave the Supreme Court an occasion to speak to the importance of the public library. In 1966, the Court reversed the conviction of five African-American men who refused to leave a segregated public library and were convicted of breaching the peace.³²² The case was decided with regard for the men's right to peaceably assemble and express their opposition to segregation.³²³ *Brown* presented no issue pertaining to specific library content or the patron's freedom to receive, rather than express. One of the defendants asked for a book, and the librarian obtained it for him.³²⁴ Nevertheless, the Court opined on the nature of the library: "It is an unhappy circumstance that the locus of these events was a public library—a place dedicated to quiet, to knowledge, and to beauty."³²⁵ Referring to the racial segregation policy, the Court added that regulation of public libraries must be "reasonable and nondiscriminatory."³²⁶ Regulations may not be invoked "as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."³²⁷

In 1982, a Court plurality decided *Pico*—a case about the censorship of specific content in a secondary-school library—in favor of teenage library patrons. In response to objections from a conservative parent group, a local school board in New York ordered the removal from a high school library of nine books the board deemed "anti-American,

319. *Id.*

320. 383 U.S. 131 (1966).

321. 457 U.S. 853 (1982).

322. *Brown*, 383 U.S. at 136–38, 143.

323. *Id.* at 141–42.

324. *Id.* at 136–37.

325. *Id.* at 142. Even dissenting Justice Black agreed as to the library's "dedicat[ion]," while he regretted what he perceived as the Court's invitation to protestors to disrupt library quiet. *Id.* at 167 (Black, J., dissenting).

326. *Id.* at 143.

327. *Id.*

anti-Christian, anti-Sem[i]tic, and just plain filthy.”³²⁸ The books included the anonymous *Go Ask Alice*, the Langston Hughes-edited *Best Short Stories of Negro Writers*, and Kurt Vonnegut’s *Slaughter House Five*.³²⁹ The plurality in *Pico* determined as a threshold matter that the First Amendment rights at stake in the case were in no way diminished because the complainants were minors, because the library was in a school, or because the right to receive rather than the freedom of expression was the implicated right.³³⁰ While acknowledging that the courts should be reluctant to “intervene in the resolution of conflicts which arise in the daily operation of school systems,” the plurality stated that intervention is warranted when “basic constitutional values”—such as the right to receive—are “directly and sharply implicate[d]” in those conflicts.³³¹

The plurality immediately distinguished the *Pico* dispute from questions of a curricular nature, over which local school boards have considerable control.³³² “[U]se of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional.”³³³ The plurality also restricted *Pico* to library book removal, not book acquisition or selection.³³⁴ The case presented a

328. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 856–57 (1982) (citing *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979) (upholding the book removal)) (internal quotation marks omitted).

329. *Id.* at 857 n.3.

330. *Id.* at 866–67. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1942), the Supreme Court established minors’ entitlement to First Amendment rights sufficiently vigorous to trump a school’s administrative and curricular preferences. *Id.* at 642. In 1969, the Court stated that minors “[do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969). These precedents formed a basis for *Pico*’s application of the right to receive in the high school context. See *Pico*, 457 U.S. at 864–66, 868, 870–72.

331. *Pico*, 457 U.S. at 866 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)) (internal quotation marks omitted).

332. *Id.* at 862.

333. *Id.* at 869.

334. *Id.* at 862; see also *id.* at 871–72 (plurality writing without Justice Blackmun joining). Though the terms may appear interchangeably in this Article, “selection,” technically, refers to the librarian’s decisions, while “acquisition” refers to the purchasing process that follows. ROSE MARY MAGRILL & JOHN CORBIN, ACQUISITIONS MANAGEMENT AND COLLECTION DEVELOPMENT IN LIBRARIES 1 (2d ed. 1989).

question concerning the “right to receive information and ideas.”³³⁵ The plurality acknowledged that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”³³⁶

Quoting *Brown*’s “quiet . . . knowledge . . . beauty” phrase, the plurality found the school library a suitable place for students to exercise First Amendment rights.³³⁷ “[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”³³⁸

The school library is the principal locus of such freedom. As one District Court has well put it, in the school library[,] “a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.”³³⁹

In this principal locus for receiving information and ideas, the school board might have infringed on students’ rights. If the board intended by its removal decision to expunge disagreeable views, the board might indeed have violated the Constitution.³⁴⁰ The Court remanded that factual question of intent.³⁴¹

Pico thus appears to extend to a high school library the ordinary viewpoint-discrimination prohibition common in modern public forum analysis.³⁴² Under the Court’s modern public forum analysis, private speech can occur on government property in three types of forums:

335. *Pico*, 457 U.S. at 867 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)) (internal quotation marks omitted).

336. *Id.* at 866 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)) (internal quotation marks omitted). The Court also quoted James Madison: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” *Id.* at 867 (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)).

337. *Id.* at 868 (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)) (internal quotation marks omitted).

338. *Id.* (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

339. *Id.* at 868–69 (quoting *Right to Read Def. Comm. v. Sch. Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978)).

340. *Id.* at 870–71 (plurality writing without Justice Blackmun joining).

341. *See id.* at 875.

342. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting).

traditional public forums; limited, or designated public forums;³⁴³ and nonpublic forums.³⁴⁴ In traditional public forums, places such as streets and parks historically open to free expression, the government can only impose content-based restrictions on speech by overcoming the extremely demanding strict scrutiny standard. Thus, the government must demonstrate a compelling state interest in its restriction and show that the restriction is the least restrictive alternative available to achieve that interest.³⁴⁵ The same strict scrutiny standard applies in limited, or designated, public forums, which are spaces not traditionally open for free expression, but opened by government "policy and practice."³⁴⁶ Only in nonpublic forums, such as a typical government office building, is the government's burden lessened to intermediate scrutiny, or a reasonableness inquiry.³⁴⁷ In none of the three forum types is viewpoint discrimination permissible.³⁴⁸

The language of modern public forum analysis naturally does not appear in *Pico* because the doctrine was then in its infancy. But the type of forum at issue in *Pico* becomes important when applying the case to modern problems. The viewpoint-discrimination prohibition that appears in *Pico* is prohibited today in all three of the forum types; not even in a nonpublic forum may the government discriminate against private expression on the basis of viewpoint. But the Court's efforts to distinguish the school library from the school curriculum suggest that *Pico* treated the school library as a limited public forum. *Pico* analogized to an earlier case, *Tinker v. Des Moines Independent School District*,³⁴⁹ in which the Court upheld student First Amendment rights against an administration ban on black armbands as a war protest. Censorship would have been appropriate only if the student expression had caused a material and substantial disruption of the school's educational mission, or invaded the rights of others in the school.³⁵⁰ Later, in 1988, the Court distinguished *Tinker* in allowing a school principal to censor a curricular

343. There is no legally significant difference between a designated public forum and its subset limited public forum. See *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1261 & n.21 (3d Cir. 1992).

344. *Cornelius*, 473 U.S. at 803; *Perry*, 460 U.S. at 45-46.

345. *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 45.

346. *Cornelius*, 473 U.S. at 802.

347. *Id.* at 800.

348. *Id.* at 473 U.S. at 811; *Perry*, 460 U.S. at 57.

349. 393 U.S. 503.

350. *Id.* at 513.

student newspaper, in *Hazelwood School District v. Kuhlmeier*.³⁵¹ The school principal was permitted to censor to achieve legitimate pedagogical objectives.³⁵² The modern understanding of the *Tinker-Hazelwood* dichotomy is that the former expression, the black armbands, occurred in the school generally, a limited public forum, while the student newspaper, a curricular exercise, was a nonpublic forum.³⁵³ “Material and substantial disruption” restates public-forum strict scrutiny, while “legitimate pedagogical objectives” restates nonpublic-forum intermediate scrutiny.³⁵⁴ Because *Pico* analogized to *Tinker*, the public school library in *Pico* was a limited public forum.

Unfortunately, the *Pico* plurality added a dictum that blurs the otherwise attractively clean line between the non-curricular limited public forum and the curricular nonpublic forum.³⁵⁵ The plurality wrote that had the school board removed the books for reasons of “educational suitability” or because they were “pervasively vulgar,” removal would have been “perfectly permissible.”³⁵⁶ Those criteria sound more like legitimate pedagogical objectives than like material and substantial disruption, i.e., the criteria sound more like the reasonableness test in a nonpublic forum than like the watered-down strict scrutiny test in a limited public forum. The discrepancy might be neutralized by understanding the dicta in the context of the plurality’s general discussion of the curricular/non-curricular distinction; i.e., only if the school board in some way had adopted these into the curriculum could there be an “educational suitability” question.

Pico remains a staple case in First Amendment law,³⁵⁷ but the case was decided by a splintered Court, undermining the decision’s precedential value. Justice Brennan wrote the plurality opinion, in which

351. 484 U.S. 260 (1988).

352. *Id.* at 273. Lower courts since *Hazelwood* have made a mockery of the legitimacy inquiry, allowing gross administrator encroachment on student rights, and even on teachers’ rights, in curricular contexts. See ROBERT S. PECK, LIBRARIES, THE FIRST AMENDMENT, AND CYBERSPACE: WHAT YOU NEED TO KNOW 109, 112 (2000); Peltz, *supra* note 13, at 495–500.

353. See, e.g., Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons from Lamb’s Chapel*, 24 N.M. L. REV. 1, 19–20 (1994).

354. E.g., *id.*

355. E.g., PECK, *supra* note 352, at 109.

356. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 871 (1982) (plurality writing without Justice Blackmun joining).

357. See STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS 474–80 (3d ed. 2001); RODNEY A. SMOLLA, THE FIRST AMENDMENT: FREEDOM OF EXPRESSION, REGULATION OF MASS MEDIA, FREEDOM OF RELIGION 188–99 (1999); WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 384–99 (2d ed. 1996).

Justices Marshall and Stevens joined; Justice Blackmun joined the plurality opinion only in parts.³⁵⁸ Justice Blackmun refused to embrace the plurality's "right to receive" rationale, instead focusing on the school board's wrongful suppression of ideas.³⁵⁹ Justice White filed a concurring opinion; he would have remanded for the resolution of what he perceived as unresolved factual disputes.³⁶⁰ Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor filed four separate dissenting opinions.³⁶¹ Chief Justice Burger and Justices Rehnquist and O'Connor uniformly framed the issue as a discretionary matter for local government.³⁶² The school board, in a simple and proper exercise of local authority, and inevitably influenced by "personal or moral values," decided what messages it preferred to convey in expending money and library shelf space.³⁶³ "[G]overnment as educator," Justice Rehnquist concluded, is like "government as employer [or] property owner,"³⁶⁴ certainly a *Hazelwood* view of the school library. Justice Powell added his "genuine dismay" at the plurality's usurpation of local authority.³⁶⁵ All four dissenting Justices rejected any heightened constitutional interest students might have in the school library, as apart from the tightly controlled student curriculum.³⁶⁶

358. See *Pico*, 457 U.S. at 855.

359. See *id.* at 877–78 (Blackmun, J., concurring).

360. See *id.* at 883–84 (White, J., concurring).

361. See *id.* at 885–921 (Burger, C.J., Powell, Rehnquist, and O'Connor, JJ., variously dissenting).

362. See *id.* at 889, 891 (Burger, C.J., dissenting); *id.* at 909–10 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

363. *Id.* at 909–10 (Rehnquist, J., dissenting); see also *id.* at 889, 891 (Burger, C.J., dissenting); *id.* at 921 (O'Connor, J., dissenting). Justice Rehnquist wrote: "The effective acquisition of knowledge depends upon an orderly exposure to relevant information." *Id.* at 914 (Rehnquist, J., dissenting); cf. Kay S. Hymowitz, *Tinker and the Lessons from the Slippery Slope*, 48 *DRAKE L. REV.* 547, 554–55, 565–66 (2000) (asserting that the courts erred in expanding civil rights for "citizens in training," and that such decisions threaten freedom by undermining child development).

364. *Pico*, 457 U.S. at 920 (Rehnquist, J., dissenting).

365. See *id.* at 894 (Powell, J., dissenting).

366. See *id.* at 892–93 (Burger, C.J., dissenting); *id.* at 895 (Powell, J., dissenting); *id.* at 910 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting). Arguably, the four dissenters' position that management of the school library is in its entirety a curricular matter, thus the school library is a nonpublic forum, should be binding precedent. Justice White expressed no opinion on the constitutional questions presented, and Justice Blackmun's narrow ruling disfavoring viewpoint discrimination is consistent with the school library as nonpublic forum. Thus the proposition enjoyed the support of a Court plurality. But cf. *infra* Part IV.C (arguing that general public library must be public forum).

The Chief Justice and Justices Powell and Rehnquist railed against any student "right to receive,"³⁶⁷ which Justice Rehnquist characterized as "a curious entitlement" that Justice Brennan had "fashion[ed] out of whole cloth."³⁶⁸ In his assault on Justice Brennan's opinion, Justice Rehnquist pointed out that the selection-removal distinction "makes little sense" if one's goal is to avert the suppression of ideas, and that "educational suitability" or "pervasive vulgarity" are "determinations . . . based as much on the content of the book as determinations that the book espouses pernicious political views."³⁶⁹ Perhaps significantly, only three of the Justices then on the Court remain there today—Stevens, O'Connor, and now-Chief Justice Rehnquist—and the political balance has drifted toward favoring the *Pico* dissenters.³⁷⁰

Pico's vague plurality is not the only factor that makes *Pico* difficult to decipher and apply today. That the case arose in a high school library muddies the extent to which the plurality's statements about teen rights, or the extent to which the dissenters' contrary statements, can be analogized to adult patrons in a public library. Rendering the case even less readily adaptable as precedent, the plurality holding can be read strictly to establish the impermissibility *only* of viewpoint discrimination in the high school library, the narrow ground on which Justice Blackmun decided the case. Thus, it remains unsettled to what extent *Pico* dicta can be fairly interpreted to import public forum analysis into library law.

Pico leaves in its wake another troublesome question that becomes important in applying the decision today: What about book *selection*? Justice Brennan was careful to limit the plurality opinion to removal.³⁷¹ Selection poses a particular evidentiary problem: if officials' intentions were dispositive, a court would be hard pressed to look inside the minds of librarians to determine why they acquired one book as opposed to another.³⁷² With all the books from which librarians have to choose, they

367. *Pico*, 457 U.S. at 895 (Powell, J., dissenting).

368. *Id.* at 910 (Rehnquist, J., dissenting). Justice Rehnquist also asserted that, due to Justice White's refusal to address the constitutional issues in *Pico*, the Court should have dismissed the writ of certiorari as improvidently granted. *Id.* at 904 n.1 (Rehnquist, J., dissenting). See generally PETER IRONS, BRENNAN VS. REHNQUIST 180–82 (1994) ("Justice Rehnquist did not conceal his scorn for Brennan's effort to constitutionalize a 'right to read.'").

369. *Pico*, 457 U.S. at 916–17 (Rehnquist, J., dissenting).

370. See generally TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 267–69 (2000).

371. *Pico*, 457 U.S. at 862.

372. See Nadel, *supra* note 32, at 1124.

can readily offer space and financial constraints as innocuous viewpoint-neutral, even content-neutral, explanations for their decisions.³⁷³ But if *Pico* is to be fit into the public forum rubric, then is Justice Rehnquist correct that acquisition and removal must be subject to the same standard?³⁷⁴ However difficult to prove improperly-discriminating selection,³⁷⁵ the door must be open for the claim,³⁷⁶ at least with regard to viewpoint discrimination.³⁷⁷

Moreover, if the library is in any sense a traditional or limited public forum, then even viewpoint-neutral but content-based selection decisions must be justified, such as the decision to acquire books about space exploration rather than about geology. Such inherently content-based selection decisions do not preclude libraries' classification as public forums. It might be that the shelf-space and financial constraints create a compelling state interest in a content-based selection process that, when conducted by professional librarians, satisfies strict scrutiny. It might also be that the strict scrutiny-standard may be adapted to the special needs of a library, as *Tinker* can be understood to have adapted the standard to schools.

While *Pico* seems to create as many questions as it answers, it nevertheless represents the best there is in the Supreme Court

373. See, e.g., *id.* (explaining that some librarians failed to acquire Madonna's explicit book, *Sex* (1992), purportedly not because of its content, but because the book's metal cover and spiral binding would be too difficult to maintain on library shelves); see also PECK, *supra* note 355, at 53 (describing libraries' *Sex* dilemma).

374. See, e.g., Nadel, *supra* note 32, at 1123 & n.27.

375. *Id.* (positing discriminatory impact as a means to prove viewpoint-discriminatory selection); *id.* at 1126 (positing for proof of viewpoint discrimination, a "threshold . . . based on the likely ability of the court to resolve the dispute . . . such as evidence of the discriminator's intent").

376. Nadel analogizes the Court's reluctance to entangle itself in public broadcasting editorial judgments, *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-76 (1998), to a likely reluctance to involve itself in public library selection decisions. Nadel, *supra* note 32, at 1125-26. While that analogy is well-founded in the Court's preference against usurpation of local prerogative, see, e.g., *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988), the result would be unfortunately inconsistent with libraries' historical importance in public receipt of expression, see Bell, *supra* note 318, at 221. *Forbes* presented the special problem of a public trustee in a traditionally regulated medium. See *Forbes*, 523 U.S. at 672-73. The Court would hardly point to local prerogative as reason to refrain from applying its precedents in a case of censorship on a city street. See, e.g., *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (striking local licensing ordinance for excessive discretion in regulating parades); see also *Pico*, 457 U.S. at 866 (plurality holding that book removal "directly and sharply implicate[s]" "basic constitutional values" (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (internal quotation marks omitted))).

377. See *infra* Part IV.E (distinguishing selection challenges from removal challenges).

jurisprudence of library law. Absent further guidance from the Court, the lower courts have resorted to the analytical tools at their disposal. If high school students enjoy a right to receive in their libraries, where rights presumably are more circumscribed than in the adult community, then one can infer a corresponding right for adult patrons of the general public library.³⁷⁸ And if viewpoint discrimination is prohibited in the high school library, where rights are presumably more circumscribed than in the adult community, then one can infer that public forum analysis applies to patron access to the general public library.³⁷⁹ Thus, Internet filtering in whatever sort of library and for whatever age of patron must be held up to a *Pico* looking-glass.

2. *In the Internet Era: Mainstream Loudoun*

Despite the tradition of free access to materials in public libraries, many libraries succumbed to pressure from patrons and government officials to install filters. In 1998, the United States District Court for the Eastern District of Virginia applied *Pico* to the problem of Internet filtering in the public library.³⁸⁰ Public libraries in Loudoun County, Virginia, required all patrons accessing the Internet to use terminals equipped with X-Stop, a filtering software package.³⁸¹ The librarians' aim, according to their AUP, was to block patron access to obscenity, child pornography, and material harmful to juveniles.³⁸² Patrons who believed websites were improperly blocked by X-Stop could petition librarians to unblock specified sites.³⁸³ It was undisputed that X-Stop had erroneously blocked patrons' access to sites without content that was illegal or harmful to minors, such as The Safer Sex Page, the Books for Gay and Lesbian Teens/Youth page, and the Renaissance Transgender

378. See, e.g., *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1253–55 (3d Cir. 1992).

379. See, e.g., *id.* at 1255–56.

380. *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 2 F. Supp. 2d 783, 792 (E.D. Va. 1998) (*Mainstream Loudoun I*). See generally Geraldine Rosales, Note, *Mainstream Loudoun and the Future of Internet Filtering for America's Public Libraries*, 26 RUTGERS COMP. & TECH. L.J. 357 (2000); Semitsu, *supra* note 16, at 520; Julia M. Tedjeske, Note, *Mainstream Loudoun and Access to Internet Resources in Public Libraries*, 60 U. PITT. L. REV. 1265 (1999).

381. *Mainstream Loudoun I*, 2 F. Supp. 2d. at 787.

382. *Id.*

383. *Id.* at 797.

Association page.³⁸⁴ Under § 1983, the plaintiff patrons alleged a violation of their “right to access protected speech on the Internet.”³⁸⁵

Mainstream Loudoun v. Board of Trustees of the Loudoun County Library consists of two detailed opinions on pretrial motions to dismiss and for summary judgment; in both, U.S. District Judge Brinkema—who holds a master’s degree in library science from Rutgers University³⁸⁶—reached several critical conclusions in the plaintiffs’ favor. Despite its limitations, the parties agreed that *Pico* was “the most analogous authority on [the First Amendment] issue.”³⁸⁷ However, the parties disagreed over whether filtering was a library selection or a library removal.³⁸⁸ The library argued that Internet filtering is a selection decision, thus escaping *Pico*; the library even asserted a right to viewpoint discrimination in selection decisions.³⁸⁹ Defendants analogized the Internet to an inter-library loan system, in which patrons request material, in this case websites, from other libraries;³⁹⁰ those materials are thereby subject to the library’s selection standards. The patrons argued that Internet filtering was a library removal decision, thus controlled by the *Pico* plurality decision.³⁹¹ In plaintiffs’ view, the library acquires the Internet like it acquires “a set of encyclopedias,” and blocking a website is like blacking out an undesirable article with a magic marker.³⁹² The court agreed with the patrons, bringing *Pico* to bear on X-Stop.

The court was thus required to adapt *Pico* to, or “retrofit” *Pico* with, modern public forum analysis.³⁹³ Defendants contended that the public library is a nonpublic forum, while patrons contended that the public library is a limited public forum.³⁹⁴ The court agreed with the patrons,

384. *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 556 & n.2 (E.D. Va. 1998) (*Mainstream Loudoun II*).

385. *Mainstream Loudoun I*, 2 F. Supp. 2d at 787.

386. 1 ALMANAC OF THE FEDERAL JUDICIARY 2002, 4th Circuit 55 (2002).

387. *Mainstream Loudoun I*, 2 F. Supp. 2d at 792.

388. *Id.* at 793.

389. *Id.* at 794.

390. *Id.* at 793.

391. *Id.*

392. *Id.*

393. See *supra* part III.B.1.

394. *Mainstream Loudoun v. Bd. of Trs. Of the Loudoun County Library*, 24 F. Supp. 2d 552, 561–62 (E.D. Va. 1998) (*Mainstream Loudoun II*).

thus consigning X-Stop, an inherently content-based mechanism, to strict scrutiny,³⁹⁵ a much higher hurdle than the simple ban on viewpoint discrimination that appears on the face of *Pico*. The court reached its “limited public forum” determination in reliance on a Third Circuit decision, *Kreimer v. Bureau of Police*.³⁹⁶

Yet another important decision in library law that had nothing to do with the library collection, *Kreimer* upheld library rules that resulted in the homeless plaintiff’s repeated expulsion from the library.³⁹⁷ Significantly, the *Kreimer* court ruled that the public library was a limited public forum, after ample consideration of three factors: government intent for the forum, extent of public use of the forum, and the nature of the forum and its compatibility with free expression.³⁹⁸ Judge Brinkema conducted a similar analysis with the same result.³⁹⁹ On the first point, the government is not obliged to open a public library, but does so by choice; that choice demonstrates a government intent to create a forum for public communication.⁴⁰⁰ On the second point, the government opens the public library for area residents to come and go, using the library as they please; that open-door policy points to a public forum.⁴⁰¹ Finally, the *Kreimer* court cited *Brown* for the proposition that a library’s “very purpose is to aid in the acquisition of knowledge through reading, writing and quiet contemplation.”⁴⁰²

Under the court’s construction of strict scrutiny, the library would have to demonstrate that X-Stop (1) served compelling state interests; (2) was necessary to serve those interests; and (3) was a narrowly drawn means to serve those interests.⁴⁰³ On the first prong of strict scrutiny, the library asserted as compelling interests “minimizing access to illegal pornography; and avoidance of creation of a sexually hostile environment.”⁴⁰⁴ Though the patrons challenged whether those interests

395. *Id.* at 563.

396. 958 F.2d 1242 (3d Cir. 1992).

397. *Id.* at 1246.

398. *Id.* at 1259–62.

399. *Mainstream Loudoun II*, 24 F. Supp. 2d at 562–63.

400. *Kreimer*, 958 F.2d at 1259.

401. *Id.* at 1260.

402. *Id.* at 1261.

403. *Mainstream Loudoun II*, 24 F. Supp. 2d at 564–65. This is a demanding formulation of strict scrutiny, which is typically formulated as only a two-prong test without a distinct inquiry into necessity. *E.g.*, SMOLLA, *supra* note 232, § 3.03[1][a], at 3–82.

404. *Mainstream Loudoun II*, 24 F. Supp. 2d at 564.

were the library's true motivations, the patrons did not deny their compelling nature.⁴⁰⁵ The court therefore assumed that compelling state interests were at stake.⁴⁰⁶

But the court could find neither necessity for X-Stop nor narrow tailoring in its methodology. Filtering advocate David Burt was unable to persuade the court of necessity, pointing to only four incidents nationwide in which minors' access to pornography created a problem, and to no librarian complaints of a hostile work environment.⁴⁰⁷ As to narrow tailoring, patrons contended that AUPs, privacy screens, terminal placement, patron education, time limits, filters for minors only, and criminal law enforcement offered less restrictive alternatives to X-Stop.⁴⁰⁸ The court agreed that privacy screens, casual monitoring, and filters for minors only offered less restrictive alternatives, though expressly declined to decide whether those solutions "would necessarily be constitutional if implemented."⁴⁰⁹

The court was more troubled by X-Stop as an overbroad mechanism and as a prior restraint. The court commented negatively on over-inclusiveness, or the sandbox effect, in that X-Stop reduced adult patrons to only material fit for children.⁴¹⁰ The court also commented on over-inclusiveness in that the filter blocked constitutionally-protected, non-obscene adult content.⁴¹¹ The court further identified an impermissible prior restraint arising from (1) the libraries' delegation of blocking determinations to a private vendor with secret criteria; (2) the chilling effect created by the unblocking procedure; and (3) the lack of procedural safeguards, such as expeditious judicial review, in the unblocking process.⁴¹² The imposition of filtering between patron and content is akin to a licensing scheme that impedes free expression, and

405. *Id.* at 565.

406. *Id.*

407. *Id.* at 565–66. A hostile work environment claim has since been filed. *See supra* notes 17, 19.

408. *Mainstream Loudoun II*, 24 F. Supp. 2d at 566.

409. *Id.* at 567.

410. *Id.* at 567–68.

411. *Id.*

412. *Id.* at 569–70 & n.22. Delegation, especially to a private entity using secret criteria, runs afoul of the Constitution because it creates a risk of viewpoint discrimination. *See Nadel, supra* note 32, at 1147–50.

filters' near arbitrariness is akin to impermissibly broad government discretion in the granting of licenses.⁴¹³

The Loudoun County library system did not appeal. The library board subsequently adopted a new Internet policy that does not restrict adult access to the Internet, but restricts minors to use only filtered access unless parents say otherwise.⁴¹⁴

IV. THE LAW OF INTERNET FILTERING TO COME

The Loudoun County Library chose not to appeal its loss in the Eastern District of Virginia, but the all-patron filtering question will probably reach the Supreme Court in the CIPA cases—which involve the right to receive Internet content in public libraries—notwithstanding any pertinent dicta that might appear in the COPA case—which involves the right to disseminate content on the Internet. To solve the CIPA problem, the Court will have to face the questions that confronted Judge Brinkema in *Mainstream Loudoun*. Is *Pico* controlling law? If *Pico* controls, is filtering selection or removal? Does it matter? Does public forum analysis pertain? If so, is the public library a limited public forum? If the library is a limited public forum, is filtering narrowly drawn? In any event, is filtering a prior restraint?

While the *Pico* foundation is shaky, the validity of that precedent might not matter at all to the resolution of the CIPA cases. Recall Judge Brinkema's reasoning: She identified *Pico* as controlling precedent, she asked whether filtering is removal or selection, then she proceeded under "removal" to apply public forum analysis. But *Pico* predates public forum analysis. Only by looking to *Pico*'s focus on viewpoint discrimination and reliance on *Tinker* can we squeeze *Pico* into the public forum pantheon.⁴¹⁵ If *Pico* is not controlling precedent, or if filtering is selection, then we are "outside *Pico*." The Supreme Court's dominant mode of analysis whenever private persons exercise First Amendment rights on public property is now public forum analysis.⁴¹⁶ In *Mainstream Loudoun* and the CIPA cases, patrons are exercising their First Amendment right to receive information and ideas on public

413. See *id.* at 568.

414. See LOUDOUN COUNTY PUBLIC LIBRARY INTERNET POLICY (adopted Dec. 1, 1998), previously at http://censorware.net/legal/loudoun/981201_internetpol_lclpl.html (last visited July 21, 2001).

415. See *infra* Part IV.B.1.

416. See *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45–46 (1983).

property, the public library computers. In the end, it probably makes no difference whether *Pico* is good law and whether filtering is selection or removal.

The viability and applicability of *Pico* is discussed at greater length in Part IV.B and is raised here only to demonstrate the likelihood that public forum analysis will likely be brought to bear in the CIPA cases in any event. Part IV.C demonstrates that once public forum analysis is brought to bear, *Mainstream Loudoun* correctly determined that the library collection must be a public forum; indeed, arguably, the library should be classified a traditional public forum. Part IV.D demonstrates that under the strict scrutiny inquiry of public forum analysis, *Mainstream Loudoun* correctly ruled that filters are overbroad because they are not narrowly drawn, and thus they necessarily fail strict scrutiny.

This series of conclusions from *Mainstream Loudoun* raises a potential flaw in the analysis, which filtering proponents exploit. If the library collection is a public forum, then should not public forum doctrine apply to selection as well as removal? Justice Rehnquist in *Pico* rejected any rational distinction between selection and removal,⁴¹⁷ and in truth, the Internet could be construed either way. If public forum analysis bears on library selection, an inherently content-based process, then strict scrutiny pertains. Filtering proponents argue that library selection cannot pass strict scrutiny. Indeed, it is difficult to imagine how the selection of books about entomology instead of etymology, or spiders instead of ants, or Jack Kerouac instead of Tom Wolfe, could be narrowly drawn solutions, even assuming that overcoming financial and space constraints are compelling state interests. Because it is so difficult to thread library selection through strict scrutiny, filtering proponents conclude that the court in *Mainstream Loudoun* erred. The proponents argue that libraries must be nonpublic forums for selection purposes, and maybe for removal purposes too; i.e., libraries must be nonpublic forums when they filter the Internet. Under the lenient nonpublic forum analysis, filters' overbreadth becomes less problematic, and filters become more likely to pass constitutional muster.

417. Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 916-17 (1982) (Rehnquist, J., dissenting).

This problem may be termed “the selection paradox,” and it is explored in depth in Part IV.E. Though intriguing, the problem proves to be a myth.

Though ignoring the selection paradox, *Mainstream Loudoun* ruled that filtering is an impermissible prior restraint on First Amendment activity. That ruling pertains regardless of whether the selection paradox can be resolved,⁴¹⁸ and Part IV.F demonstrates that the ruling is correct.

A. *Pico* and the Applicability of Forum Analysis

For lack of other authority, lower courts today struggle with fractured *Pico* when they face questions of a library patron’s First Amendment rights. But two *Pico* voices that endure on the Court today are those of dissenting Justices Rehnquist and O’Connor, in whose direction Court politics have shifted in the intervening twenty years.⁴¹⁹ Thus one may doubt that the Court will show great deference to the plurality reasoning in *Pico*. The Court could approach the library problem anew and distinguish *Pico* as a school-law case. Moreover, the Court could approach library management as a question of government speech rather than as a question of patron rights. Fortunately, the Court will not likely adopt these “outside *Pico*” approaches, for these approaches would be ill-advised.

Granted, the dissenting opinions in *Pico* from Justices Rehnquist and O’Connor focused on the educational mission of schools and the immature First Amendment rights of minors.⁴²⁰ But dissenting Chief Justice Burger, joined by Justices Rehnquist, O’Connor, and Powell, observed that the books removed from the school library were available to students in the public library.⁴²¹ That observation suggests that the same censorship the dissenters would have approved in *Pico* might be found problematic in a public library, even as to minor patrons. The *Pico* dissenters did not utterly refute a right to receive, and indeed did not speak to a minor’s First Amendment rights wholly outside the school

418. One cannot seriously contend that ordinary selection processes constitute a prior restraint. Nadel, *supra* note 32, at 1130.

419. See YARBROUGH, *supra* note 370, at 267–69. Justice Stevens, who concurred fully in the *Pico* plurality with Justices Brennan and Marshall, is today one of the Court’s most senior Justices. But the Court has not moved in their leftward direction.

420. See *Pico*, 457 U.S. at 913–15 (Rehnquist, J., dissenting); *id.* at 921 (O’Connor, J., dissenting).

421. *Id.* at 886 (Burger, C.J., dissenting).

setting, especially in a forum where parents can directly supervise their children. Indeed, it would be irrational to limit *Pico* to school law and then allow filtering as to adult patrons in the public library. Children in the public school would then have broader First Amendment rights than adults in the public library. That strange inconsistency would leave *Pico* in such a cloud of uncertainty as to render its plurality effectively overruled. Shaken free from its perch in the public forum doctrine, *Pico* would crash to the ground and likely take *Tinker* with it. For once it is proven that *Pico* was improperly retrofit with public forum doctrine, one can no longer be certain that *Tinker* has any place in the public forum pantheon. *Tinker* might be reduced from a constitutional staple, a building block of *Pico*, to historical anomaly, an intemperate extension of children's rights amid the fervor of the civil rights era. One might hope that the Court is too judicious with its power to leave school law in such disarray.

The greater threat to *Pico* viability today is that the Court, per Chief Justice Rehnquist, would view the public library collection through the lens of government speech rather than the lens of citizen rights.⁴²² Under the "government as speaker"⁴²³ doctrine, public library computers would be the product of a federal subsidy program, rather than of a federal regulatory program.⁴²⁴ The full force of public forum doctrine can come to bear only in case of a federal regulatory program.⁴²⁵ Under a federal subsidy program, the government itself is the speaker and "may indirectly abridge speech"⁴²⁶ as long as the program does not "aim[] at the suppression of dangerous ideas."⁴²⁷ A subsidy conception is signaled

422. *E.g.*, NADEL, *supra* note 32, at 1135 ("[C]ivil libertarians would better direct their resources to emphasizing that [library] selections cannot be treated as government speech, [which] would permit viewpoint discrimination."). "[T]here seems little danger that even Justice Rehnquist would permit municipalities to exercise [such] discretion Yet as public libraries begin to assume new roles the issue of treating them as government speech might arise more forcefully." *Id.*; *see also*, *e.g.*, Brent L. VanNorman, Comment, *The Library Internet Filter: On the Computer or in the Child?*, 11 REGENT U. L. REV. 425, 437-38 (1998-1999). For discussion of Justice Rehnquist's *Pico* opinion as a precursor to government speech doctrine, see Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1414-15 (2001).

423. *E.g.*, NEA v. Finley, 524 U.S. 569, 610 (1998) (Souter, J., dissenting).

424. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 552 (2001) (Scalia, J., dissenting).

425. *See id.* (Scalia, J., dissenting).

426. *See id.* (Scalia, J., dissenting) (emphasis in original).

427. *Id.* (Scalia, J., dissenting) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)) (internal quotation marks omitted).

by cases such as *Rust v. Sullivan*,⁴²⁸ in which Chief Justice Rehnquist, writing for the Court, approved limited viewpoint-based restrictions on the speech of government-funded doctors,⁴²⁹ and *NEA v. Finley*, in which the Court distinguished subsidies for the arts from situations when “direct regulation of speech or a criminal penalty [is] at stake.”⁴³⁰ Recall that Justice Rehnquist in *Pico* analogized “government as educator” to “government as employer [or] property owner”;⁴³¹ he might conclude that government as librarian fits the analogy as well. An exegesis on the folly of reconciling the government-as-speaker doctrine—a resurrection of the right-privilege doctrine⁴³²—with traditional First Amendment analysis exceeds the scope of this Article.⁴³³ Suffice it to say that the dispute engendered by this dichotomy rages on in the Court today. A 2001 decision, *Legal Services Corp. v. Velazquez*,⁴³⁴ limited the reach of the *Rust*/subsidy conception.⁴³⁵ Faced with a viewpoint-based government restriction on public support for legal services, the Court relied on the forum analysis of *Rosenberger v. Rectors & Visitors of University of Virginia*⁴³⁶ rather than the subsidy analysis of *Rust*.⁴³⁷ The Court distinguished the expenditure of public money to facilitate private speech from money expended to support the government’s own message.⁴³⁸ Predictably, the Chief Justice in *Velazquez* joined Justices O’Connor, Thomas, and Scalia in the latter’s dissent.⁴³⁹

Comparing *Finley-Rust* subsidy analysis with *Velazquez-Rosenberger* forum analysis, deciding which today would apply to the public library under CIPA’s e-rate/IMLS funding scheme becomes more a question of political ideology than of objective inquiry. Under subsidy analysis, the government enjoys almost limitless discretion, even, effectively, to

428. 500 U.S. 173 (1991).

429. *Id.* at 192–93.

430. *Finley*, 524 U.S. at 587–88.

431. *Bd. of Educ. v. Pico*, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting).

432. See JEROME A. BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 351 (2d ed. 2000).

433. See *id.* at 348–66.

434. 531 U.S. 533 (2001).

435. *Id.* at 540–49.

436. 515 U.S. 819 (1995).

437. *Velazquez*, 531 U.S. at 540–43 (citing *Rosenberger*, 515 U.S. at 833–34).

438. *Id.* at 542.

439. See *Velazquez*, 531 U.S. at 549.

engage in viewpoint discrimination.⁴⁴⁰ Meanwhile, forum analysis triggers substantial constitutional protections. In *Finley*, Justice Scalia, concurring, and Justice Souter, dissenting, disagreed sharply over whether *Rust* or *Rosenberger* was the proper model.⁴⁴¹ Justice Souter was prepared to distinguish *Rust* from *Rosenberger* based on a sensible distinction "between government-as-buyer or -speaker and government-as-regulator-of-private-speech."⁴⁴² In *Rust*, Congress used private speakers to express information about a government program, while in *Rosenberger* the government interest was in furthering private expression per se.⁴⁴³ But Justice Scalia showed no allegiance to such a distinction. Instead he would permit government-as-speaker discretion even when government plays favorites among private speakers by funding those with government-friendly viewpoints.⁴⁴⁴ Justice Scalia would strictly construe the First Amendment and limit government discretion only when it affirmatively suppresses speech.⁴⁴⁵

Fortunately for libraries, the more recent *Velazquez* decision invoked Justice Souter's distinction, suggesting the propriety of forum analysis.⁴⁴⁶ The Court in *Velazquez* decided that Congress's conditional funding of the Legal Services Corporation constituted the facilitation of private speech,⁴⁴⁷ contrary to the dissenters' view of the funding as a subsidy for government's own speech.⁴⁴⁸ The Court invoked *Rosenberger*, which involved student publication funding at the University of Virginia.⁴⁴⁹ In *Rosenberger*, the university intended to facilitate students' own private expression,⁴⁵⁰ similarly in *Velazquez*, the

440. See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."), quoted in *NEA v. Finley*, 524 U.S. 569, 588 (1998).

441. Compare *Finley*, 524 U.S. at 598-99 (Scalia, J., concurring), with *id.* at 610-15 (Souter, J., dissenting).

442. *Id.* at 612 (Souter, J., dissenting).

443. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (citing *Rust*, 500 U.S. at 194), quoted in *Finley*, 524 U.S. at 612 n.7 (Souter, J., dissenting).

444. See *Finley*, 524 U.S. at 598 (Scalia, J., concurring).

445. *Id.* at 599 (Scalia, J., concurring).

446. ALA Compl., *supra* note 11, ¶ 4 (quoting *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting)).

447. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001).

448. *Id.* at 552 (Scalia, J., dissenting).

449. *Id.* at 541 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

450. *Rosenberger*, 515 U.S. at 834, cited in *Velazquez*, 531 U.S. at 542.

government through the Legal Services Corporation provided funding for private attorneys to represent the views of their private clients.⁴⁵¹

The public library falls squarely in the *Velazquez-Rosenberger* camp. The very mission of the public library, historically, is “freewheeling inquiry,” to quote Justice Rhenquist’s own word in *Pico*.⁴⁵² Where the government in *Rosenberger* sought to facilitate classic free expression, the public library seeks to facilitate the First Amendment right to receive information and expression. The public library buys computers to foster First Amendment activity, both from the point of view of the content author and from the point of view of the library patron. Unlike the clinicians in *Rust*, public library computers are not intended to carry any government message;⁴⁵³ rather, public libraries acquire Internet access to facilitate private expression per se. Thus government-as-speaker doctrine is not the appropriate mode of analysis.⁴⁵⁴

Thus, the positions advocated by the vigorous *Pico* dissenters do no harm to the *Mainstream Loudoun* analysis. *Pico* is properly analogized to the modern public library case, and any distinction based on *Pico* as a school-law decision cannot accord with inferior rights for adults in the public library. Moreover, the problem of patron access should lead the courts invariably to public forum doctrine, not government-as-speaker doctrine, regardless of *Pico*.

B. The Library as a Limited Public Forum Rather Than a Nonpublic Forum

When forum analysis is brought to bear, whether filtering is selection or removal, the nature of the library collection, including Internet access, must be determined. The Third Circuit previously determined in *Kreimer* that the library as a physical space is a limited public forum,⁴⁵⁵ and the

451. *Velazquez*, 531 U.S. at 542.

452. *Pico*, 457 U.S. at 915.

453. See NADEL, *supra* note 32, at 1135 (“The viewpoint-based discrimination permitted for government speech should only be acceptable from entities that are created to serve the political purposes of elected officials attempting to implement their policies. Entities that were expressly created and historically operated for nonpartisan purposes, like public libraries, . . . do not fall within this realm.”).

454. It is not clear whether under Justice Scalia’s strict interpretation of the First Amendment, the government might be able to use CIPA’s e-rate/IMLS scheme to manipulate library content. But even Justice Scalia should be concerned that the government’s intent under CIPA is not to promote any message at all, rather to suppress broad classes of content and possibly to suppress viewpoints.

455. *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1261 (3d Cir. 1992).

court in *Mainstream Loudoun* extended that ruling to the library collection.⁴⁵⁶ Critics of *Mainstream Loudoun* would have the public library be a non-public forum, either as a result of its own declaration,⁴⁵⁷ or as a result of a corrected application of *Kreimer*.⁴⁵⁸ Attorney Mark Nadel in particular argues that *Mainstream Loudoun* erred in applying *Kreimer*, and that *Kreimer* is inapplicable.⁴⁵⁹

In Nadel's conception of the library, librarians act in one capacity when deciding what patrons may enter the library, and a different capacity when deciding what content to add to the library collection.⁴⁶⁰ The Third Circuit in *Kreimer*, which concerned a homeless man's access to the library, ruled the library a limited public forum.⁴⁶¹ But Nadel contends that the *Mainstream Loudoun* court erroneously extended that ruling to the library's collection, "fail[ing] to acknowledge that the First Amendment often applies differently to the different aspects of a multidimensional medium like a library."⁴⁶² A public library, Nadel then argues, is a nonpublic forum because it does "no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' to use it."⁴⁶³

Nadel is partly right; the library is in some sense a "multidimensional medium." But it does not necessarily follow that the library collection is a nonpublic forum. The public library, like many public facilities, contains multiple forums. The library floor is a limited public forum, as in *Kreimer*. The library director's office is a nonpublic forum. That access to a forum is limited to a class of persons does not necessarily make the forum nonpublic.⁴⁶⁴ The staff break room in the library might

456. *Mainstream Loudoun v. Bd. of Trs. of Loudoun*, 24 F. Supp. 2d 552, 562-63 (E.D. Va. 1998) (*Mainstream Loudoun II*).

457. NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, MEMORANDUM OF LAW IN SUPPORT OF NLC PROPOSAL FOR AN INTERNET USE POLICY FOR LIBRARIES 2-3 (2000), at <http://www.nationallawcenter.org/NLC%20Library%20Internet%20Policy%20and%20Memo%203-15-00.pdf> (last visited Apr. 30, 2002) [hereinafter NLC PROPOSAL MEMORANDUM].

458. VANNORMAN, *supra* note 222, at 431-32 & n.55.

459. NADEL, *supra* note 32, at 1133 & n.81.

460. *Id.* at 1132.

461. *Kreimer*, 958 F.2d at 1261.

462. NADEL, *supra* note 32, at 1133.

463. *Id.* at 1134 (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679-80 (1998)) (internal quotation marks omitted); see also NLC LEGAL MEMORANDUM, *supra* note 19, at 21 (asserting that libraries are nonpublic forums because they require patrons to have library cards to make full use of library services).

464. See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 353 (6th Cir. 2001) (*Kincaid II*).

be a nonpublic forum, but there might be a bulletin board in the break room designated as a “free speech zone” for employees: a limited public forum open to a selected class.

A three-judge panel of the Sixth Circuit erred in its forum analysis, on the question of limited access, in *Kincaid v. Gibson*.⁴⁶⁵ *Kincaid* arose from a battle between student editors and university administrators for control of university yearbook content. The Sixth Circuit en banc ultimately concluded that the university yearbook was a limited public forum as to student editors, even though the editors were selected and had to meet objective academic criteria, and even though the audience was the limited class of university students.⁴⁶⁶ The court quoted the Supreme Court in *Arkansas Educational Television Commission v. Forbes*,⁴⁶⁷ explaining the difference between “general access,” as in a limited public forum, and “selective access,” as in a nonpublic forum.⁴⁶⁸

General access is defined as the situation in which the government “makes its property generally available to a certain class of speakers.” . . . Selective access occurs when the government “does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission’ to use it.”⁴⁶⁹

Forbes was on its face a special case. The Supreme Court warned against “the public forum doctrine [being] extended in a mechanical way to [a] very different context.”⁴⁷⁰ Notwithstanding the unique nature of the regulated broadcast medium, the Court in *Forbes* treated a public broadcast station like a nonpublic forum as to political candidates wanting to participate in a program designed by station producers.⁴⁷¹ Candidates did not have a presumptive right to appear on the program; even though the program was open to political candidates, producers retained discretion to decide which ones, based on their likelihood of success in the election.⁴⁷²

465. 191 F.3d 719 (6th Cir. 1999) (*Kincaid I*), rev’d en banc, *Kincaid II*, 236 F.3d 342.

466. *Kincaid II*, 236 F.3d at 349 n.9.

467. 523 U.S. 666 (1998).

468. *Id.* 353.

469. *Id.* (quoting *Forbes*, 523 U.S. at 679, omitting citations and adding emphasis).

470. *Forbes*, 523 U.S. at 672–73.

471. *Id.* at 676–83.

472. *Id.* at 680–83.

Were the public library truly a case of would-be speech receivers having to "obtain permission" in each instance to access the collection, or even to access the library computers, then Nadel would be right, and the library would be a nonpublic forum. But that is not the case. Anyone may walk into a public library and browse the shelves.⁴⁷³ Resource check-out and computer use might be limited to residents of the district the library serves, and in that sense, those services are "generally available to a certain class" of receivers.⁴⁷⁴ Typically any teen or adult in that class has a presumptive right to obtain a library card. Persons who violate library policies might have their cards revoked, removing them from the class, like student editors might be removed from office because falling grades violate the policies that define the class. But the library card serves only to preserve the orderly maintenance of the collection by ensuring that patrons, the speakers/receivers, are and remain legitimate members of the class. Giving patrons library cards is thus like giving student editors keys to the yearbook office. Giving patrons computer access passwords to receive Internet expression through the library network is like giving student editors computer passwords to produce yearbook expression through the campus network. That modest access restriction does not alter the nature of the forum, but merely promotes its orderly use. In employing that modest restriction, the public librarian does not retain discretion to choose which patrons may use the collection and cannot employ content-based use restrictions by peering over patrons' shoulders or sifting through patrons' check-out records. In contrast, the public television producer does retain discretion to choose which candidates appear in a debate and does base that decision on whether the candidate's message has garnered popular support.⁴⁷⁵

473. See, e.g., *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1260 (3d Cir. 1992).

474. See *Forbes*, 523 U.S. at 679.

475. One reason *Forbes* might make a more appealing analog to the filtering case than *Kincaid* is that the complaining would-be speaker in *Forbes* and the filtering case is a person outside the government workplace, a member of the general public—the candidate and the library patron respectively—rather than the designated government editor, producer, or librarian, as in *Kincaid*. But that similarity/dissimilarity has no legal significance as long as the forum is analyzed from the complainant's perspective. In fact, the general-public analogue, a university student, was also a plaintiff in *Kincaid*, asserting his First Amendment right to receive. *Kincaid v. Gibson*, 236 F.3d 342, 353 n.15 (6th Cir. 2001) (*Kincaid II*). The yearbook appeared as a limited public forum both from his perspective as a complaining would-be receiver and from the editor's perspective of would-be speaker. See *id.*; see also BELL, *supra* note 318, at 205–06 (observing that public forum cases are

The library collection is at least a limited public forum and arguably a traditional public forum. Even if *Kreimer* is distinguishable as a case about “the library-as-shelter” rather than “the library-as-collection,” it would be absurd to conclude that the library-as-shelter is a limited public forum,⁴⁷⁶ while concluding that the library-as-collection is something less. The library collection is a repository for information and ideas, including those at the core of First Amendment protection. Professor Bernard Bell describes libraries as “the archetypal traditional government-funded loci for acquiring knowledge.”⁴⁷⁷ Their history can be traced to the mid-1800s, if not to Benjamin Franklin’s subscription library of the late eighteenth century.⁴⁷⁸ If the library as a whole is the quintessential locus of the right to receive, the patron and the collection are the quintessential receiver and received. Thus from the perspective of the patron,⁴⁷⁹ the library collection arguably meets the historical-significance test for the traditional public forum: a place “that has as ‘a principal purpose . . . the free exchange of ideas’”⁴⁷⁹ if not “immemorially . . . held in trust for the use of the public . . . for . . . communicating thoughts between citizens.”⁴⁸⁰ Granted, the Supreme Court consistently refers to the public street or park as the archetypal traditional public forum for affirmative expression.⁴⁸¹ But nothing about free speech’s companion right to receive suggests that it, too, should not have an archetype in the traditional public forum genre, and libraries fit the bill. To accord library patrons inferior First Amendment rights vis-à-vis the library-as-collection, relative to a homeless man’s rights vis-à-vis the library-as-shelter, abandons common sense.

Nadel contends that even if *Kreimer* controls, the *Mainstream Loudoun* court mishandled the three-factor inquiry—government intent for the forum, extent of public use of the forum, and inherent nature of

typically brought by the speaker, not the audience, but that the forum should be classified according to the proper perspective).

476. BELL, *supra* note 318, at 221.

477. *Id.* at 220. “Public libraries in their modern form started in the mid-1800s and developed from a wide variety of privately run libraries and collections.” *Id.* at n.162.

478. *See id.* at 205–06 (observing that public forum cases are typically brought by the speaker, not the audience, but that the forum should be classified according to the proper perspective).

479. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund Inc.*, 473 U.S. 788, 800 (1985)).

480. *Id.* (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)); *see also* ALA, LIBRARIES: AN AMERICAN VALUE (1999) (“Libraries are a legacy to each generation . . .”), at http://www.ala.org/alaorg/oif/lib_val.html (last visited Apr. 30, 2002).

481. *See, e.g., Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672–73 (1998).

the forum—to determine whether the Loudoun County libraries were limited public forums or nonpublic forums.⁴⁸² His objections on all three elements are rooted in a common theme: the librarians' discretion in book selection. With respect to intent, he complains that libraries do not collect "'all' content," that a "library would [not likely] accept all donations."⁴⁸³ With respect to use, he shifts focus off actual patron use and reasserts that libraries are "selective" and "'do not contain every book published."⁴⁸⁴ With respect to nature, Nadel again opines that libraries are "discerning, not indiscriminate, collectors of content."⁴⁸⁵

But librarians' intentional selectivity reflects money and space constraints, not government intent for, use of, and nature of the forum. Nadel presumes that were a librarian offered, say, all content cataloged in *Books in Print*, and money and space were of no consequence, the librarian would say "no." Hardly. What librarian would not like to have the collection and resources of the Library of Congress under his roof? What community would not want the collection and resources of the Library of Congress around the corner? Libraries have developed the inter-library loan system, which gives every patron in a participating library system access to the collections of every other library in the system—a simulation of a collection without horizon. But the real thing, a Library of Congress in every town, has been a dream. It was impossible to conceive of a mechanism that could make the dream reality—before the Internet. Now the Internet shows how a Library of Congress in every town might one day be possible. For now, intellectual property law and fear of piracy keeps books in print, where copies can be controlled better. In time, though, computers in the library might come to outnumber bookshelves. And with Internet connectivity, libraries surely will share access to these electronic resources.

Once a library establishes Internet connectivity, additional web content poses no problem of time or space; finite computer resources can be allocated with content-neutral measures such as time limits.⁴⁸⁶ Nadel

482. NADEL, *supra* note 32, at 1133 n.81.

483. *Id.*; see also NLC LEGAL MEMORANDUM, *supra* note 19, at 21.

484. NADEL, *supra* note 32, at 1133 n.81 (quoting *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 203 (E.D.N.Y. 1999)).

485. *Id.*

486. Nadel disagreed with *Mainstream Loudoun's* conclusion that additional web content is cost-free, analogizing budget constraints on book selection to budget constraints on computer hardware purchase, and to patrons' inability to use computers monopolized by other patrons "for disfavored

suggests that a library would not accept all donations, and that, by its nature, the collection is selective, finite. But this selectivity turns on physical space limitations and cataloging resources. Internet access is, in essence, the donor of everything, at no cost of additional space or resources.⁴⁸⁷ Librarianship, after all, is about helping people access and sift information and ideas; librarianship, ideally, is not about deciding what information people may access and what they may not.⁴⁸⁸

Thus, the *Mainstream Loudoun* court correctly concluded, in analyzing government intent, that when the library's mission statement endorsed access to "all avenues of ideas,"⁴⁸⁹ it meant *all*.⁴⁹⁰ *Mainstream Loudoun* correctly focused on patrons' use of the library as receivers,⁴⁹¹ not book authors' role in the library as speakers. Both patrons and

uses." *Id.* at 1128–29. But first, *Mainstream Loudoun* did not utterly disregard the cost of Internet connectivity. A library need not "select" the Internet at all, but once Internet connectivity is established there is no *additional* cost for *additional* web content. Second, Nadel conflated "websites advertised as XXX" with non-research-oriented protocols such as chat, concluding that "the First Amendment should not forbid libraries" from blocking either. *Id.* at 1129. But see *id.* at 1130–31 (suggesting that AUPs are preferable to filters, though invite litigation). Admittedly the line can be thin between the government restriction that defines the bounds of a limited public forum and the restriction that discriminates between content within that forum. But while protocol differentiation comfortably defines a forum boundary, differentiation between lawful sexual content and, say, Westlaw.com is exactly the sort of value-laden judgment that the First Amendment forbids government to make in a limited public forum. If patron monopolization of computer terminals is a problem, then the solution necessarily lies in content-neutral AUP rules such as time limits, not schemes to assess the relative social worth of patrons' online explorations. Should a reference librarian favor an adult's question about radon over an earlier received question from a teen about lesbianism? Can we differentiate between entertainment (Discovery Canada's *The Sex Files*? See Brenda Bouw, *Discovery Takes the Sex Files Further into the Night*, NAT'L POST, Dec. 14, 2000, available at 2000 WL 30651989) and information (Pulitzer Prize-winning *Wit*? See Deborah Martin, *Play Has Powerful Punch; 'Wit' Opens at Magik Theater*, SAN ANTONIO EXPRESS-NEWS, July 6, 2001, available at 2001 WL 22459751)?

487. Sarah E. Warren, *Filtering Sexual Material on the Internet: Public Libraries Surf the Legal Morass*, FLA. BAR J., Oct. 1999, at 52.

488. Cf. NADEL, *supra* note 32, at 1137 (describing the role of librarians to "find the most suitable version of the information they seek quickly and easily," though confusing librarians with journalists, who exclude the non-newsworthy from coverage). See generally ALA, CODE OF ETHICS OF THE ALA, at <http://www.ala.org/alaorg/oif/ethics.html> (last visited Apr. 30, 2002).

489. *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library*, 24 F. Supp. 2d 552, 563 (E.D. Va. 1998) (*Mainstream Loudoun II*), quoted in NADEL, *supra* note 32, at 1133 n.81.

490. The NLC has proposed an AUP that on its face reserves Internet access terminals as a nonpublic forum. NLC MEMORANDUM, *supra* note 457, at 2–3; see NLC, NLC PROPOSAL FOR AN INTERNET USE POLICY FOR IMPLEMENTATION IN PUBLIC LIBRARIES I (2000), at <http://www.nationallawcenter.org/NLC%20Library%20Internet%20Policy%20and%20Memo%203-15-00.pdf> (last visited Apr. 30, 2002) [hereinafter NLC PROPOSAL]. But the government's mere assertion should not supersede, nor dominate, the *Kreimer* analysis. See PELTZ, *supra* note 13, at 550–53.

491. See *Mainstream Loudoun II*, 24 F. Supp. 2d at 563.

libraries benefit from the open access policy of the ALA.⁴⁹² Finally, *Mainstream Loudoun* correctly discerned the library's nature, defined by its mission, as wholly consistent with the unrestricted accumulation of information and ideas.⁴⁹³ Arguably a traditional public forum, there can be no serious contention that the nature of the library is incompatible with the unrestrained exercise of the First Amendment right to receive.

D. Filtering as Overbroad

If the library collection, including the Internet, is a limited public forum, then strict scrutiny applies. *Mainstream Loudoun* critics contend that even in that case, filters can pass muster under strict scrutiny as a narrowly drawn means to advance compelling state interests.⁴⁹⁴ But that argument is frail; by the time the analysis reaches strict scrutiny, there can be little serious contention that filtering is narrowly drawn.

The NLC flatly asserts that filters work, and any dispute about overbreadth involves simply a choice between different brands and features of filters of varying quality.⁴⁹⁵ According to the NLC, "there are currently software filters on the market that can block *only* sites that provide hard-core and child pornographic material."⁴⁹⁶ The NLC goes so far as to assert that filtering software can block content specifically "educationally unsuitable' or harmful to minors, or otherwise inappropriate or unwanted."⁴⁹⁷ The NLC trumpets these sophisticated new filters as a vast improvement over "the first generation 'word' filters touted to the courts in the CDA cases by the ACLU and ALA plaintiffs as an alternative to the CDA"⁴⁹⁸

Unfortunately for the NLC, these sophisticated new filters do not exist. Filter makers' assurances that their blocking decisions are based

492. See ALA, LIBRARY BILL OF RIGHTS, at <http://www.ala.org/work/freedom/lbr.html> (last visited Apr. 30, 2002).

493. See *Mainstream Loudoun II*, 24 F. Supp. 2d at 563.

494. See, e.g., VanNorman, *supra* note 422, at 433-35. There can be little doubt that the protection of children is a compelling state interest. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 863 n.30 (1997). Libraries may assert other interests as well, which might or might not be constitutionally adequate. See, e.g., NLC PROPOSAL, *supra* note 490, at 3-12.

495. See NLC LEGAL MEMORANDUM, *supra* note 19, at 53.

496. *Id.* (emphasis in original).

497. *Id.*

498. *Id.*; see also *supra* note 193.

on only human review have proven sorely disappointing, if not plainly false.⁴⁹⁹ If the filter does rely on a human review to establish its block list, that list will be woefully under-inclusive.⁵⁰⁰ And fine legal definitions remain beyond filters' grasp. Even using site-blocking driven by human review, part-time employees with no legal expertise can hardly be expected to determine what is harmful to minors according to the prevailing standards of an adult community⁵⁰¹ a thousand miles away.

More rational, if not more promising, than the NLC's groundless confidence in filters, proponents argue that filters pass strict scrutiny because no other means to protect children is as effective.⁵⁰² This theory depends on an understanding that the "narrowly drawn" prong of strict scrutiny analysis in fact requires that there is a "less restrictive" alternative, that is, that government has selected the least restrictive means.⁵⁰³ Framing strict scrutiny to require the least restrictive of available means appears more permissive than the "narrowly drawn" standard. The Court has used both terms in applying strict scrutiny to public forums.⁵⁰⁴ But "less restrictive" is a comparative term, while "narrowly drawn" hypothesizes some objective standard of "narrowness." Looking at the words for their ordinary meanings, the "least restrictive" mechanism need not be "narrow" at all. Indeed, had the CDA in *Reno* been a grossly blunt instrument, but no less restrictive alternatives were as effective, then exclusively "least restrictive means" analysis would have upheld the CDA.⁵⁰⁵ The Court could not have

499. See *supra* Part II.B.

500. SurfControl says that CyberPatrol's block list has about 100,000 sites. Jim Morrison, *Protecting Kids from Cyberwolves*, FAMILY PC FROM ZDWIRE, Mar. 19, 2001, available at 2001 WL 7573047. Even assuming CyberPatrol is not at all over-inclusive, and assuming CyberPatrol can keep its human review rate in pace with new websites and changing web content, then one in four to one in three pornographic websites escape CyberPatrol's reach. See NUNBERG, *supra* note 27, at 31.

501. The Supreme Court test for obscenity as to minors includes an inquiry into the "prevailing standards in the adult community as a whole," *Ginsberg v. New York*, 390 U.S. 629 633 (1968), quoted in *Reno v. ACLU*, 521 U.S. 844, 895 (1997) (O'Connor, J., concurring in part and dissenting in part), companion to the "contemporary community standards" safeguard of the adult obscenity test, *Miller v. California*, 413 U.S. 15, 24 (1973).

502. See, e.g., VANNORMAN, *supra* note 422, at 434-35 & n.85.

503. See *id.* at 434.

504. *Reno*, 521 U.S. at 879 (stating that with the "less restrictive" alternatives available, "the CDA is not narrowly tailored if that requirement has any meaning at all"). To make matters more complicated, "narrow[] tailor[ing]" is concerned also with reviewing content-neutral restrictions in public forums, when the state advances "significant government interest[s]." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

505. Cf. VOLOKH, *supra* note 164, at 148-59 (criticizing the Court for hanging its hat on alternative child protection measures "at least as effective" as the CDA).

intended such a result.⁵⁰⁶ The two terms therefore cannot be read to the exclusion of each other, lest strict scrutiny be rendered impotent.

Pro-filtering enthusiasts of “least restrictive means” analysis fail when their “proof” of no less restrictive alternatives typically consists only of attacks on the efficacy of the alternatives.⁵⁰⁷ Brent VanNorman, for example, contends that no other means to protect minors are available because ACLU-endorsed AUPs, time limits, education programs, site recommendations, and privacy screens are not foolproof, i.e., “do not protect children from Internet pornography.”⁵⁰⁸ But even while advocating the comparative “less restrictive” standard, VanNorman fails to explore the over- and under-inclusiveness of filters. Thus, in his zeal to find fault in competing alternatives, he never demonstrates how filters can meet any fair measure of narrowness.

Nadel concedes that “even if libraries dispensed with superficial rule-word filters, and thus avoided the silly errors they generate, the danger of political biases from current black list filters may be too great to permit their use.”⁵⁰⁹ He allows time, though, for filter makers “to refine their designs.”⁵¹⁰

E. *Filtering as Removal, or the Myth of the Selection Paradox*

If *Mainstream Loudoun* properly analyzed filtering under public forum analysis, and consequently strict scrutiny, there arises as corollary a troubling line of inquiry, about which filtering opponents make much ado. This line of inquiry concerns whether a filter is a “selection” or a “removal” device, or more precisely, whether there is any legitimate distinction. From this line of inquiry, filtering opponents derive the “selection paradox,” which challenges the *Mainstream Loudoun* approach in the first instance. The selection paradox arises from *Pico* and *Mainstream Loudoun* as follows. Forum analysis, per *Kreimer*, marks the library collection as a public forum for removal decisions. According to *Mainstream Loudoun*, filters are removal decisions that fail

506. Cf. *id.* at 157–59 (concluding that the Court could not have meant that the CDA may stand if reenacted when Congress has evidence that the alternatives the Court suggested in *Reno* are not as effective as the CDA).

507. See, e.g., VANNORMAN, *supra* note 422, at 434–35 & n.85.

508. *Id.*

509. NADEL, *supra* note 32, at 1151.

510. *Id.*

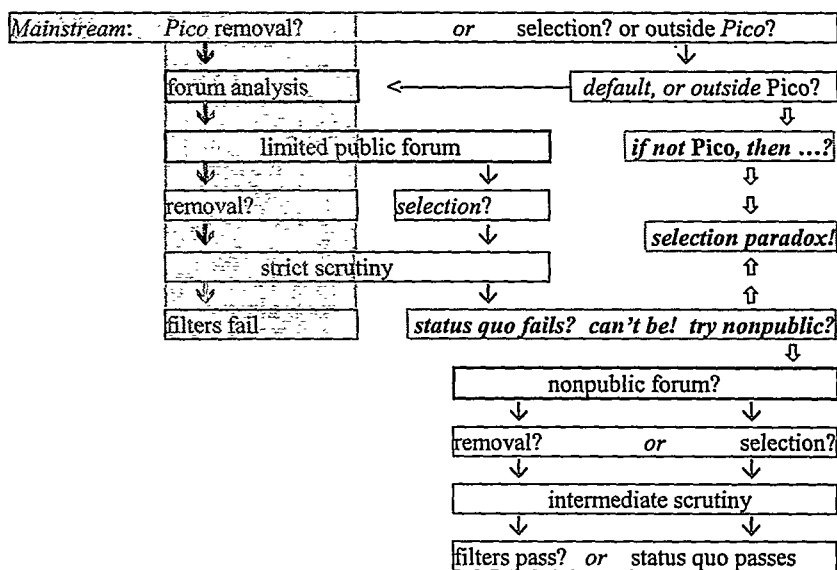
strict scrutiny. But if a court can be persuaded that filtering is selection rather than removal—a fine line, or, per now-Chief Justice Rehnquist, no rational line at all—and that the library, for selection purposes, is a nonpublic forum—i.e., an author has no right to expression on library shelves—then filtering might pass muster under intermediate scrutiny, as a reasonable means to a legitimate end. (Never mind for the moment that filtering is an overbroad prior restraint.)

The filtering opponent might respond that the library collection is always a public forum, for all purposes, with regard to the patrons who receive information and ideas. But that formulation invites the application of strict scrutiny to selection, a dangerous endeavor. Even if one could establish that a library's physical and financial constraints give rise to compelling state interests, it is difficult to argue that the selection process is narrowly drawn. For example, that not all libraries acquire non-obscene pornography, such as *Playboy*, exposes a flaw in the selection process. But the filtering opponent will score few points on the court of public opinion by arguing that libraries should carry a representative sample of the pornographic genre.

Thus the filtering opponent is pressed into a corner: compelled to concede that selection occurs in a nonpublic forum, so that the status quo of book selection can be preserved; and pressed to argue for a selection-removal distinction that is technologically equivocal and that the current Chief Justice has refused to perceive.

This "selection paradox" is represented graphically in the following chart.

Chart
MAINSTREAM LOUDOUN/CIPA DECISION TREE
AND THE SELECTION PARADOX



The Chart illustrates how a “selection” determination—whether as a precursor to or as a part of forum analysis, and including a determination that there is no rational distinction between selection and removal—not only takes the analysis “outside *Pico*,” but also takes the analysis outside *Mainstream Loudoun*. Outside *Mainstream Loudoun*, there are two possibilities: the nonpublic forum inquiry of forum analysis, which conflicts with the forum determination guided by *Kreimer*; or some other approach outside forum analysis.

In truth, neither of those possibilities pertains because the selection paradox is a fiction. It is a fiction because there is a legitimate distinction between selection and removal, and filtering can be properly characterized only as removal.

When Judge Brinkema described filtering as removal rather than selection, it seems at first blush that she applied a hopelessly outmoded

distinction to a distinctively modern problem. Marshall McLuhan might have charged her with “look[ing] at the present through a rear-view mirror,” or “liv[ing] imaginatively in Bonanza-land.”⁵¹¹ McLuhan condemned “the application of outdated critical concepts based on a misguided application of the values of a print-based culture to the products of the electronic age.”⁵¹² Removal provided Judge Brinkema with a convenient and known analytical framework: *Pico*, handily retrofit with public forum analysis. She did not then have to decide what analysis pertains “outside *Pico*,” or deal with the impact of forum analysis on the selection process.

But to charge Judge Brinkema with a decision of convenience is to give her too little credit. In fact, the distinction—*some* distinction—makes sense, even if the words “selection” and “removal” are outmoded.⁵¹³ Justice Brennan’s opinion itself in *Pico* gives little indication why he drew a distinction between selection and removal, focusing instead on removal as “the danger of an official suppression of ideas,”⁵¹⁴ but he was probably cognizant of the evidentiary problem inherent in second-guessing librarians’ countless selection decisions. Concurring, Justice Blackmun expressed “some doubt” about the “theoretical distinction” between selection and removal, but then he quoted with approval Judge Newman, writing in concurrence with the affirmed Second Circuit decision in *Pico*, that

there is a profound practical and evidentiary distinction between the two actions: “removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity.”⁵¹⁵

511. MARSHALL McLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE* 75 (1967).

512. See CHRIS GREGORY, *STAR TREK: PARALLEL NARRATIVES* 5 (2000).

513. Inspiring my conclusion here, my colleague Professor John DiPippa teaches that even while we recognize that a historical model in the law has become merely a metaphor in light of new, technology-driven problems, we need not necessarily discard the old. Rather, we test and tinker with the metaphor, and by that process develop new models that work.

514. See *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 862, 871–72 (1982).

515. *Id.* at 878 n.1 (Blackmun, J., concurring) (quoting *Bd. of Educ. v. Pico*, 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring)).

Indeed, scholars subsequently recognized this evidentiary problem as the basis of the distinction.⁵¹⁶ The law would have difficulty getting a grip on library selection, which editor and publisher Eric Moon described in 1969 as “like trying to lasso an eel.”⁵¹⁷ Nadel suggested in 2000 that library selection is “comparable to the making of laws and sausages,”⁵¹⁸ meaning that society, content with the tasty result, has looked the other way while librarians made unpalatable content-based, even viewpoint-based, selection decisions.⁵¹⁹ Nadel suggests that within the framework of a nonpublic forum analysis, evidentiary standards might be developed to allow legal challenges to selections.⁵²⁰

Evidentiary feasibility justifies Judge Brinkema’s selection-removal distinction, because filtering criteria or blocking lists are producible and thus may be subject to judicial scrutiny. But the evidentiary problem is not the sole sensible reason for a selection-removal distinction. Rather, selection and removal are fundamentally different functions.

Nadel champions *Finley* as the proper analog to analyze filtering in the library. Indeed, the analog is appealing. *Finley* involved the inherently content-based process by which the National Endowment for the Arts awards grants to support artistic work.⁵²¹ The NEA’s invariably subjective criteria include:

“technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the

516. See, e.g., Joy Koletsky, Note, *First Amendment—Free Speech: Right To Know—Limit of School Board’s Discretion in Curricular Choice—Public School Library as Marketplace of Ideas*, 27 CASE W. RES. L. REV. 1034, 1049 (1977) (“The only apparent distinction between a case involving selection of books and one involving removal is an evidentiary problem in the former.”), cited in Gordon Danning, *Freedom of Speech in Public Schools: Using Communication Analysis to Eliminate the Role of Educational Ideology*, 19 HASTINGS CONST. L.Q. 123, 153 n.137 (1991).

517. Eric Moon, *Introduction*, in BOOK SELECTION AND CENSORSHIP IN THE SIXTIES 4 (Eric Moon ed., 1969).

518. NADEL, *supra* note 32, at 1139 n.104. Eels, it turns out, are “particularly fond” of sausage. Coarse Angling in Australia, *Eels*, previously at <http://members.ozemail.com.au/~waldock/Eels.html> (last visited Mar. 6, 2001).

519. See LEROY CHARLES MERRITT, BOOK SELECTION AND INTELLECTUAL FREEDOM 12–13 (1970) (“That some librarians consciously or unconsciously do engage in censorship in the selection process is an unfortunate irrelevancy.”); see also *supra* note 373 and accompanying text. Rose Mary Magrill and John Corbin described the library patron’s “‘black box’ mentality: it does not matter to the library’s clientele what goes on behind the scenes, so long as the needed material or information is available when required.” MAGRILL & CORBIN, *supra* note 334, at vii.

520. See *supra* notes 372–75 and accompanying text.

521. NEA v. *Finley*, 524 U.S. 569, 585 (1998) (discussing “the nature of arts funding”).

work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form."⁵²²

Moreover, the Court in *Finley* approved as viewpoint neutral the additional criteria, "general standards of decency and respect for the diverse beliefs and values of the American public."⁵²³ The NEA selection criteria bear a striking resemblance to the invariably content-based library selection criteria. For example, the Boulder, Colorado, selection policy lists criteria including "[l]iterary and artistic merit," "[a]ppropriateness and effectiveness of medium to content," "[p]ositive . . . review[s]," "[p]opularity with library patrons," "[i]mportance as a document of the times," "[p]resent and potential relevance to community needs," and "[s]uitability of subject, style and reading level for the intended audience."⁵²⁴

In *Finley*, the Court checked only for viewpoint neutrality in the NEA process, and from there arises Nadel's suggestion for similarly lenient scrutiny of filtering in the public library.⁵²⁵ The Court focused on the risk of "suppress[ing] . . . dangerous ideas,"⁵²⁶ as in *Pico*. But *Finley* is properly analogized only to library selection, indeed, only to library book selection. The Court recognized that NEA selectivity was driven by "limited resources," requiring that "the majority of the grant applications" NEA receives be denied even if they bear artistic merit.⁵²⁷ Similarly, library selection is driven by limited budgets, and librarians

522. *Id.* (quoting Petitioner's brief).

523. *Id.* at 576 (quoting 20 U.S.C.A. § 954(d)(1)) (internal quotation marks omitted).

524. BOULDER PUBLIC LIBRARY, MATERIALS SELECTION POLICY, at <http://www.boulder.lib.co.us/general/selection.html> (last visited Apr. 30, 2002). There is a difference of opinion regarding the treatment of sexual content in a selection policy. Compare MERRITT, *supra* note 519, at 14 ("An actual or theoretical obscenity quotient is not a criterion of selection."), with Stuart C. Sherman, Librarian Providence Public Library, Providence, R.I., Public Library, in BOOK SELECTION AND CENSORSHIP IN THE SIXTIES, *supra* note 517, at 16 (equating "pornography" with "libel" and "treason," excluded from selection).

525. See NADEL, *supra* note 32, at 1141.

526. *Finley*, 524 U.S. at 587 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983)) (internal quotation marks omitted).

527. *Id.* at 585.

cannot purchase the majority of books in print. But financial constraints do not ordinarily necessitate removal of a book already on the shelf.⁵²⁸

Using conventional understandings of the words "selection" and "removal," one can rationally argue that filtering, as a technological process, fits either definition. In every instance in which a patron requests a web page from the Internet, the filter may be analogized to a content selector that checks the web page for compliance with selection criteria before producing the content for the patron. Or under Judge Brinkema's reasoning, the filter may be perceived as affirmatively rejecting content that the library has already acquired in a one-time expenditure to open an Internet portal.⁵²⁹

But arguments founded on the conventional definitions of the two words are misplaced. The pertinent inquiry to determine whether a content-based process should be subject to the usual strict scrutiny or granted a *Finley* "pass" is whether the process "threatens to suppress the expression of particular ideas or viewpoints."⁵³⁰ In *Finley*, reasonable minds on the Court differed as to whether such a threat was posed by the statutory "decency" standard in the NEA funding scheme,⁵³¹ though no Justice posited that the funding scheme sans decency requirement posed a threat. For the NEA's usual selection process, the content-based, subjective inquiries are necessitated by financial constraints—the traditional, peculiar "nature of arts funding"⁵³²—circumstances that dictate a "pass" on strict scrutiny. Likewise, content-based, subjective inquiries, necessitated by financial constraints, describe what may be termed as the traditional, peculiar "nature of library selection" and weigh in favor of a "pass" on strict scrutiny for the usual library selection process.

The same is not true for filtering. To determine whether filtering should be subject to the usual strict scrutiny or granted a *Finley* "pass," the pertinent inquiry is again whether filtering threatens to suppress the

528. See *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring), cited in *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library*, 2 F. Supp. 2d 783, 793 (E.D. Va. 1998) (*Mainstream Loudoun I*). Routine "weeding" of the collection is, of course, a separate matter. See generally, e.g., MAGRILL & CORBIN, *supra* note 334, at 248–50.

529. See *Mainstream Loudoun I*, 2 F. Supp. 2d at 793–94.

530. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991), quoted in *Finley*, 524 U.S. at 587.

531. Compare *Finley*, 524 U.S. at 587, with *id.* at 600–01 (Souter, J., dissenting).

532. *Id.* at 585.

expression of particular ideas or viewpoints. Ample evidence suggests that it is.⁵³³ But even absent concrete examples, *Finley* suggests inquiring into whether the filtering process is necessarily content-based *because of* resource constraints, that is, as a function of the peculiar nature of library selection. In this sense, filtering and the ordinary selection process differ. Resource constraints do not demand that filters operate on a content basis, nor even that filters operate at all. That filters are in place and make content-based “decisions” despite the lack of any resource limitation poses a sufficient threat of viewpoint suppression to deny a *Finley* “pass” and boot filters back into ordinary forum analysis.

Thus, to return to and dispel the myth of the selection paradox, *Mainstream Loudoun* proves correct after all. The filtering opponent errs in conceding that filtering can be construed as selection. That the words “selection” and “removal” no longer have relevance in the context of modern technology is an alluring but not altogether true proposition. The rationale underlying the distinction still pertains, regardless of what words are used. Even superimposition of public forum analysis does not necessitate Justice Rehnquist’s rejection of a selection-removal distinction. Libraries may well be public forums, wherein a *Finley* “pass” mitigates strict scrutiny specially with regard to the selection process.⁵³⁴ Extending Justice Rehnquist’s *Pico* conflation of selection and removal imprudently allows the government a discretion in both cases that is justified only in the rare situation when the peculiarly content-dependent nature of an activity demands an analysis more lenient than usual.

F. Filtering as Prior Restraint

Mainstream Loudoun ruled that filtering is an impermissible prior restraint because of (1) the libraries’ delegation of blocking determinations to a private vendor with secret criteria; (2) the chilling effect created by the unblocking procedure; and (3) and the lack of procedural safeguards, such as expeditious judicial review, in the

533. See *supra* part II.B.

534. Thus the library need not purchase *Playboy*. Gifts, including books or a gift subscription to *Playboy*, would still trigger the *Finley* pass, as the library must invest in cataloging, maintaining, displaying, and storing donated publications. Cf. *Via v. City of Richmond*, 543 F. Supp. 382, 383–84 (E.D. Va. 1982) (on procedural grounds, allowing public library to refuse gift subscription to atheist magazine that library judged of poor quality and limited patron appeal).

unblocking process.⁵³⁵ The latter ground garners little criticism, presumably because a library may modify its procedural safeguards to allay the court's concerns and continue filtering. But filtering proponents otherwise charge that the *Mainstream Loudoun* court erred.

The NLC tries to side-step the problems of delegation and secret criteria by shifting the level of abstraction. In the NLC view, libraries and schools are not delegating a public function to private companies with secret criteria, because the libraries and schools make a choice as to which company will filter and instruct the company as to the nature of content to be filtered. The meat of the decision-making process is in deciding which filtering product to use, say CyberPatrol, and what category restriction to choose, say "full nudity." But that position thinly veils unconstitutional delegation. The *Mainstream Loudoun* court correctly understood that the decision maker is the entity in contact with the content under review—the filtering company. Imagine if the National Park Service were to assign the management of Lafayette Park in Washington, D.C., to a private agent, selected and instructed to "manage the park for lawful purposes." The private agent could not advance a partisan agenda free from judicial scrutiny. A public entity cannot immunize a process against judicial review simply by stating a constitutional objective, then wholly surrendering to private hands broad authority to attain that objective by unlawful means.

In a further effort to justify filtering, the NLC asserts, first, that a library can disable a filter "for research or special projects or [to] allow a parent to broaden a minor's permissible reach," and second, that filtered access is analogous to restricted access to special collections.⁵³⁶ These points aim to dispel the contention that unblocking imposes an impermissible chilling effect. With regard to "research" disabling, the NLC might argue that the option alleviates patrons' fears that they will have to seek special permission to access a blocked website. With regard to special collections, the NLC might argue that no chilling effect occurs there, or that any chilling effect is outweighed by a greater good, when patrons must seek special permission to access a part of the collection, so the same should hold true for blocked Internet content.

535. *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library*, 24 F. Supp. 2d 552, 569–70 & n.22 (E.D. Va. 1998) (*Mainstream Loudoun II*).

536. NLC LEGAL MEMORANDUM, *supra* note 19, at 55.

Disabling provisions at first blush offer an appealing “way out,” but constitutional problems still lurk. The NLC does not address the arbitrariness intrinsic to disabling decisions.⁵³⁷ It would be prohibitively difficult to draft a disabling policy to define “research” in a content-neutral fashion, and any content-based definition invites government to make the slippery sort of decisions the First Amendment disfavors. For example, no meaningful definition of research could approve an artist researching vulgarity in art before and since Robert Maplethorpe yet disapprove of the same artist conducting the same search with prurient intent—unless a librarian can be expected to judge the patron’s intent. The NLC is unconcerned by the troublesome notion that librarians would pass judgment over which patron requests are worthy of the “research” designation that merits unfiltered access. Meanwhile the ordinary patron might not even get as far as the reference desk; *Mainstream Loudoun* recognized a chilling effect when a patron must request access to a single site on, say, sexual dysfunction. That chilling effect is in no way diminished when a patron must request unfiltered access to research sexual dysfunction as a topic.

The NLC analogy to special collections also seems appealing but crumbles on closer inspection. Special collections are restricted *to preserve* materials that are extremely rare or unusually fragile, characteristics related to, but not co-extensive with, content. Filters operate *to ban* materials based on a content analysis. A fragile item in special collections may be protected by reasonable time, place, and manner restrictions that are not based on “content.” Arguably, rarity is a content-based determination, in which case narrowly drawn special collection restrictions may be justified under strict scrutiny. But the question is one of abstraction; arguably, a characteristic such as uniqueness is not content-based, because a historic issue of *Playboy* merits preservation as a rare piece of Americana as much as a first edition of *Huckleberry Finn*. Either way, the content-based/content-neutral distinction, exclusive of viewpoint, operates specifically to impede government from relying on “‘constitutionally disfavored justifications,’ (e.g., paternalism or curbing offensiveness)” for “restricting speech because [of] its communicative impact.”⁵³⁸ Those justifications do not motivate government in special collections, which

537. Of course, the e-rate provisions in CIPA do not even allow disabling for minors. See *supra* notes 211–12 and accompanying text.

538. BARRON & DIENES, *supra* note 432, at 34 (quoting Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987)).

exist to enhance and preserve public access. Filters, however, repudiate public access for the very reason of offensiveness, giving the public legitimate cause to scrutinize their content-based vagaries.

Nadel insists that libraries must have procedurally adequate mechanisms to correct filters' tendency to discriminate based on viewpoint,⁵³⁹ but he does not address the possibility that procedural safeguards might not cure the chilling effect in requiring patrons affirmatively to seek access to improperly blocked content, even anonymously. Interestingly, he suggests that libraries can avoid being overwhelmed by "thousands of unblocking requests—particularly if civil libertarian groups, like Peacefire.org, catalogued flaws in each brand of filter"—by pooling resources or recruiting patron volunteers to review the requests.⁵⁴⁰ One is left to wonder why "thousands of unblocking requests" do not demonstrate filters' very inadequacy.

V. CONCLUSION

Internet filtering is demonstrably inefficacious. It is at once grossly over-inclusive and under-inclusive. Blocking decisions are typically invulnerable to public inspection, based on proprietary criteria in the hands of profit-oriented businesses prone to ideological biases. Despite these limitations, Congress, in its third attempt to regulate Internet content in the name of child protection, has mandated filtering for public library patrons, on libraries' pain of losing federal financial support. The only federal court to consider the constitutionality of a library system's mandatory filtering policy decided that it violated patrons' First Amendment rights. That decision has come under intense criticism from filtering proponents, but the court's reasoning withstands scrutiny and should compel the same result in the case of CIPA, the federal statute. Filtering triggers public-forum analysis. The library is a limited public forum, and filtering, an inherently overbroad mechanism, cannot survive the "narrowly drawn" inquiry of strict scrutiny. Contrary to filtering proponents' contentions, filtering is properly classified as a removal process rather than a selection process, and library selection policies may justifiably be exempted from strict scrutiny. In any event, filtering

539. NADEL, *supra* note 32, at 1153–54.

540. *Id.* at 1154.

and discretionary unblocking procedures violate the First Amendment as a prior restraint on the right to receive constitutionally protected content.

“[P]ernicious idea[s]” might indeed have “incited the degradations of slavery and the genocidal slaughter of the Holocaust.”⁵⁴¹ But by denying government the power to proscribe the transmission of ideas for reason of their perceived perniciousness, the First Amendment “empowers and compels people to pursue their own destiny.”⁵⁴² Library patrons can learn to make their own mature decisions about the value of information and ideas. This learning defines the mission of the public library, a hallowed place to all who share in the American experience. The lessons learned there should not be forcibly distorted by virtue of government ownership. Rather patrons of the public library should be compelled only to use the filters they were born with.

541. *Microsystems Software, Inc. v. Scandinavia Online AB*, 98 F. Supp. 2d 74, 74 (D. Mass. 2000).

542. Tony Pedersen, President, Inter-American Press Association (2000), *in* FREEDOM FORUM, 2001 FIRST AMENDMENT CALENDAR JULY 18 (2001).

